SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 408

PAN-ATLANTIC STEAMSHIP CORPORATION,
APPELLANT,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 424

INTERSTATE COMMERCE COMMISSION,
APPELLANT,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JAN. 16, 1957

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[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

Civil Action No. 56-232-W

THE ATLANTIC COAST LINE RAILROAD COMPANY, et al., Plaintiffs,

v.

THE UNITED STATES OF AMERICA, Defendant

DESIGNATION OF THREE-JUDGE DISTRICT COURT—March 19, 1956

Pursuant to the authority and command of 28 U. S. C. § 2284, I hereby designate and assign Hon. Calvert Magruder, U. S. Circuit Judge for the First Circuit, and Hon. Francis J. W. Ford, U. S. District Judge for the District of Massachusetts, to sit with the Hon. Charles E. Wyzanski, Jr., U. S. District Judge for the District of Massachusetts, in the above-entitled cause, a three-judge district court being required by 28, U. S. C. § 2325.

(S.) Calvert Magruder, Chief Judge, First Circuit.

March 19, 1956.

[File endorsement omitted.]

[fol. 2] In United States District Court, District of Massachusetts

Civil Action No. 56-232-W

Atlantic Coast Line Railroad Company, The Baltimore and Ohio Railroad Company, Louisville and Nashville Railroad Company, The Pennsylvania Railroad Company, Seaboard Air Line Railroad Company, Southern Railway System and The New York, New Haven and Hartford Railroad Company, Plaintiffs,

vs.

The United States of America, Defendant,

And The Interstate Commerce Commission of the United States and Pan-Atlantic Steamship Corporation, Intervening Defendants.

Plaintiffs' Motion for Leave to File a First Amended Complaint—April 30, 1956

The plaintiffs in the above-docketed action move for leave to file their first amended complaint, attached hereto in conformity with the undertaking they made before Judge Wyzanski at a pre-trial conference held April 27, 1956.

Respectfully submitted, Atlantic Coast Line Railroad Company, The Baltimore and Ohio Railroad Company, Louisville and Nashville Railroad Company, The Pennsylvania Railroad Company, Seaboard Air Line Railroad Company, Southern Railway System and The New York, New Haven and Hartford Railroad Company, by their attorneys, W. Q. Keenan, 54 Meadow Street, New Haven 6, Conn., E. M. Sweeney, South Station, Boston, Massachusetts.

New Haven, Connecticut

April 30, 1956

[fol. 3] Of counsel:

Charles T. Abeles, James A. Bistline, Prime F. Osborn, III, Carl Helmetag, Jr., U. B. Ellis, Anthony P. Donadio.

Copies sent on [illegible]

[fol. 4] In United States District Court, District of Massachusetts

[Title omitted]

First Amended Complaint

1. This action arises under 49 U. S. C. A. §§ 911 (a), 916 (a), and 17 (9) and 28 U. S. C. A. §§ 1336 and 2321 through 2325, as hereinafter more fully appears. Therefore this court has jurisdiction because this is a civil action to set aside and annul an order of the Interstate Commerce Commission of the United States (hereinafter sometimes called the Commission).

2. The plaintiffs are railroad corporations organized and existing under the laws of various States of the United States, and are common carriers of freight and passengers in interstate commerce, among others, in the States of [fol. 5] Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Ohio, Indiana, Illinois, Delaware, Maryland, West Virginia, Kentucky, Virginia, District of Columbia, North Carolina, Tennessee, South Carolina, Georgia, Alabama, Florida, Mississippi and Louisiana.

3. An important and significant segment of the transportation operations conducted by the plaintiffs is the transcontinental movement of freight and passengers between the eastern and western portions of the United States, in conjunction with other railroad companies whose lines connect with those of the plaintiffs and extend to the West Coast of the United States. Said transcontinental transportation operations include participation by the plaintiffs in transcontinental movements of freight and passengers from Philadelphia, Pennsylvania; Baltimore, Maryland; Charleston, South Carolina; Jacksonville and Miami, Florida to Seattle, Washington; Portland, Oregon; and San Francisco, Oakland, Alameda and Los Angeles Harbor, California; from San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor, California to Boston, Massachusetts; New York Harbor, New York; Philadelphia, Pennsylvania; Baltimore, Maryland; Norfolk, Virginia; Charleston, South Carolina; and Jacksonville and

Miami, Florida; and from Seattle, Washington and Portland, Oregon to Philadelphia, Pennsylvania; Baltimore, Maryland; Norfolk, Virginia; Charleston, South Carolina and Jacksonville and Miami, Florida. Said transcontinental transportation also includes the movement of freight and passengers between and among the inland areas served by the ports above listed, corresponding to the operations above described between and among these ports.

4. Among the plaintiffs, The New York, New Haven and Hartford Railroad Company is a corporation organized and existing under the laws of Massachusetts and a resident of the Commonwealth of Massachusetts with a place [fol. 6] of business at South Station, Boston, Massachusetts.

5. Pan-Atlantic Steamship Corporation (hereinafter sometimes called Pan Atlantic) is a corporation organized and existing under the laws of the State of Delaware with a place of business at 61 St. Joseph Street, Mobile, Alabama. It is a common carrier of freight and passengers in interstate commerce between and among the following ports: Boston, Massachusetts; New York, New York; Philadelphia, Pennsylvania; Baltimore, Maryland; Georgetown and Charleston, South Carolina; Jacksonville, Miami, Tampa, Port St. Joe, Pensacola and Panama City, Florida; Mobile, Alabama; New Orleans, Louisiana and Houston and Galveston, Texas; in addition Pan Atlantic operates as a carrier intercoastally as hereinafter more fully appears.

6. On or about May 5, 1955 Pan Atlantic filed with the Commission an application for permanent authority to transport freight as a common carrier between the following Pacific and Atlantic ports:

Pacific Coast Ports

Alameda, Calif.	Everett, Wash.
Anacortes, Wash.	Grays Harbor, Wash.
Astoria, Oreg.	Kalama, Wash.
Bellingham, Wash.	Long Beach, Calif.
Bradwood, Oreg.	Longview, Wash.
Bremerton, Wash.	Los Angeles Harbor, Calif.
Empire, Oreg.	Mare Island, Calif.

Pacific Coast Ports

Marshfield, Oreg.
North Bend, Oreg.
Oakland, Calif.
Olympia, Wash.
Portland, Oreg.
Port Angeles, Wash.
Port Townsend, Wash.
Prescott, Oreg.
Rainier, Oreg.
Richmond, Calif.
St. Helens, Oreg.
San Diego, Calif.
San Francisco, Calif.
Seattle, Wash.
Stockton, Calif.
Tacoma, Wash.
Vancouver, Wash.
Warrenton, Oreg.
Wauna, Oreg.
Westport, Oreg.
Willapa Harbor, Wash.
Yaquina Bay, Oreg.

Atlantic Coast Ports

Albany, N. Y.
Baltimore, Md.
Bayonne, N. J.
Bayway, N. J.
Boston, Mass.
Bridgeport, Conn.
Brooklyn, N. Y.
Brunswick, Ga.
Camden, N. J.
Chester, Pa.
Charleston, S. C.
Georgetown, S. C.
Hoboken, N. J.
Irvington, N. Y.
Jacksonville, Fla.
Jersey City, N. J.
Marcus Hook, Pa.
New London, Conn.
Newport News, Va.
New York, N. Y.
Norfolk, Va.
Paulsboro, N. J.
Philadelphia, Pa.
Port Everglades, Fla.
Portland, Maine
Port Newark, N. J.
Portsmouth, R. I.
Poughkeepsie, N. Y.
Providence, R. I.
Savannah, Ga.
Wilmington, Del.
Wilmington, N. C.

[fol. 7] 7. Said application referred to above in paragraph 6 also requested permanent authority to transport passengers as a common carrier between the Atlantic and Pacific ports above named, both coastwise and intercoastally, except between Baltimore, Maryland and Norfolk and Newport News, Virginia; and in addition between the Pacific Coast ports above named on the one hand, and on the other, Galveston and Houston, Texas; New Orleans, Louisiana; Mobile, Alabama; Panama City, Florida; and Tampa, Florida.

8. On or about May 18, 1955 the Commission granted to Pan Atlantic authority to operate as a common carrier by self-propelled vessels in interstate or foreign commerce in the transportation of passengers and commodities between the same ports and in the same directions as those set forth in paragraph 3 hereinabove, by an order which continued in force to and including November 14, 1955 unless sooner modified by the Commission. A copy of this order is appended to the complaint herein and marked exhibit 12.

9. On or about September 30, 1955 Pan Atlantic requested the Commission to extend beyond 180 days the temporary authority granted by the Commission's order of May 18, 1955, exhibit 12, referred to in paragraph 8 hereinabove. A copy of the Commission's notice of said petition is appended to the complaint herein and marked exhibit 15.

10. On or about October 13, 1955 the plaintiffs replied to said petition, exhibit 15, referred to in paragraph 9 hereinabove, and a copy of said reply is appended to the complaint herein and marked exhibit 16.

11. The petition for reconsideration referred to in paragraph 2 of exhibit 16 is appended to the complaint herein and marked exhibit 13.

[fol. 8] 12. On or about October 28, 1955 the Commission granted said petition for extension of temporary authority, exhibit 15, referred to in paragraph 9 hereinabove, by an order which authorized Pan Atlantic to continue to perform services under the temporary authority until further order of the Commission, but not beyond the time Pan Atlantic's application for permanent authority referred to in paragraphs 6 and 7 hereinabove shall have been finally determined. A copy of said order is appended to the complaint herein and marked exhibit 17.

13. On or about November 23, 1955 the plaintiffs filed a petition for reconsideration of the Commission's said order of October 28, 1955, exhibit 17, referred to in paragraph 12 hereinabove. A copy of said petition is appended to the complaint herein and marked exhibit 18.

14. On or about January 9, 1956 the Commission denied said petition for reconsideration (exhibit 18) and a copy

of said order of denial is appended to the complaint herein and marked exhibit 19.

15. The Commission's order of May 18, 1955 granting temporary authority to Pan Atlantic, exhibit 12, and the Commission's order of October 28, 1955 authorizing Pan Atlantic to continue to perform the watercarrier service previously authorized by said temporary authority, exhibit 17, together constitute a grant of temporary authority which has been, is and will be valid for more than an aggregate of 180 days.

16. A grant by the Commission of temporary authority valid for more than an aggregate of 180 days is contrary to the provisions of section 311 (a) of the Interstate Commerce Act, 49 U. S. C. A. 911 (a) and is therefore unlawful, arbitrary and capricious.

[fol. 9] 17. Pursuant to the provisions of said final order of the Commission, Pan Atlantic has engaged in operations in interstate traffic which are commercially competitive with some of those of the plaintiffs set forth above in paragraph 3.

18. The exact amount of the damages thus suffered by the plaintiffs is impossible to compute nor is the loss of business and good will suffered by the plaintiffs in the past and threatened the plaintiffs in the future by a continuation of said operations by Pan Atlantic compensable in damages. Revenues which could have been and could be earned by the plaintiffs from patrons who have made use or who continue to use the services of Pan Atlantic described above while Pan Atlantic remains the beneficiary of the temporary authority described above have been and will be irrevocably lost and the investment of the plaintiffs in transportation facilities and equipment has been and will be rendered thereby partially unproductive.

19. Neither the Commission nor Pan Atlantic is responsible in damages to the plaintiffs for losses thus sustained in the past and to be sustained in the future; consequently the plaintiffs have no adequate remedy at law.

20. The plaintiffs are informed and believe that unless this honorable court vacates and annuls the Commission's said final order of October 28, 1955 (exhibit 17) said order will remain in effect until the determination of Pan At-

lantic's application for permanent intercoastal authority referred to in paragraph 11 (b) of the complaint herein.

21. Said application has required and will require hearings by a Commission examiner in several cities of the United States, in the course of which, so the plaintiffs are [fol. 10] informed and believe, the testimony of more than 100 witnesses will be taken.

22. The plaintiffs are informed and believe that this administrative process will not culminate in a final order for many months and possibly several years. If review in the courts is sought after such final order by the Commission, said proceeding concerning the permanent authority sought by Pan Atlantic will remain pending until such proceedings in the courts are terminated. In the meantime, the plaintiffs will continue to suffer immediate and irreparable damage through the competition of Pan Atlantic as set forth above.

23. The exhibits referred to hereinabove were uttered, dispatched and received in due course of business and in accordance with their tenor.

Wherefore, plaintiffs pray:

A. That a court constituted as required by 28 U. S. C. A. § 2284 be convened and that process issue against the Commission as provided by law.

B. That in the exercise of the power granted it by 49 U. S. C. A. § 17(9) and 28 U. S. C. A. § 1336 said court set aside the Commission's said order of October 28, 1955 (exhibit 17).

C. That said court enter a permanent injunction requiring the Commission to order the termination of the temporary operations conducted by Pan Atlantic under the temporary authority granted by the Commission's orders of May 18, 1955 (exhibit 12), and October 28, 1955 (exhibit [fol. 11] 17).

D. That plaintiffs have such further relief as is justified.

Respectfully submitted, Atlantic Coast Line Railroad Company, The Baltimore and Ohio Railroad Company, Louisville and Nashville Railroad Company, The Pennsylvania Railroad Company, Sea-

board Air Line Railroad Company, Southern Railway System and The New York, New Haven and Hartford Railroad Company, by their attorneys, W. Q. Keenan, 54 Meadow Street, New Haven, Connecticut, E. M. Sweeney, South Station, Boston, Massachusetts.

New Haven, Connecticut

April 30, 1956

Of counsel:

Charles T. Abeles, James A. Bistline, Prime F. Osborn, III, Carl Helmetag, Jr., U. B. Ellis, Anthony P. Donadio.

Duly sworn to by W. Q. Keenan. Jurat omitted in printing.

[fol. 13] EXHIBIT No. 12 TO FIRST AMENDED COMPLAINT

ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 18th day of May, A. D. 1955.

No. W-376 (Sub-No. 11)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE

No. W-376 (Sub-No. 12)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE (2)

Pan-Atlantic Steamship Corporation having made application under the provisions of section 311(a) of the Interstate Commerce Act for temporary authority to operate as a carrier by water, in interstate or foreign commerce, and having shown that there is an immediate and urgent need

for the service specified below and that there is no other carrier service capable of meeting such need: and the division so finding, therefore:

It is ordered, That applicant be, and it is hereby, authorized to operate as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation (1) of passengers and commodities generally (a) from Philadelphia, Pa., Baltimore, Md., Charleston, S. C., Jacksonville and Miami, Fla., to Seattle, Wash., Portland, Oreg., San Francisco, Oakland, Alameda and Los Angeles Harbor, Calif., (b) from San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor to Boston, Mass., New York Harbor, N. Y., Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (c) from Seattle and Portland to Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (2) of passengers between New Orleans, La., and Houston, Tex., on the one hand, and, on the other, Seattle, Portland, San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor.

It is further ordered, That in the exercise of the authority specified above, said carrier shall comply with all applicable requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder.

And it is further ordered, That this order shall continue in force to and including November 14, 1955, unless sooner suspended, modified, or set aside by further order of the Commission.

By the Commission, division 4.

[Seal] Harold D. McCoy, Secretary.

[fol. 14] EXHIBIT NO. 15 TO FIRST AMENDED COMPLAINT

INTERSTATE COMMERCE COMMISSION

September 30, 1955

Docket No. W-376 (Sub-No. 11)

Notice to the Public

Docket No. W-376 (Sub-No. 12)

Request for extension of Temporary Authority

Filed September 30, 1955. By Pan-Atlantic Steamship Corporation, Waterman Building, 81 St. Joseph St., Mobile, Ala.

Request that temporary authority granted by order of May 18, 1955, to operate as a common carrier by self propelled vessels, in interstate or foreign commerce, in the transportation (1) of passengers and commodities generally (a) from Philadelphia, Pa., Baltimore, Md., Charleston, S. C., Jacksonville and Miami, Fla., to Seattle, Wash., Portland, Oreg., San Francisco, Oakland, Alameda and Los Angeles Harbor, Calif., (b) from San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor to Boston, Mass., New York Harbor, N. Y., Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (c) from Seattle and Portland to Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (2) of passengers between New Orleans, La., and Houston, Tex., on the one hand, and, on the other, Seattle, Portland, San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor, until November 14, 1955, be continued in effect until such time as the application for a certificate in W-376 (Sub-No. 13) has been determined.

Harold D. McCoy, Secretary.

[fol. 15] EXHIBIT NO. 16 TO FIRST AMENDED COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

No. W-376 (Sub-No. 11)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE

No. W-376 (Sub-No. 12)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE (2)

REPLY OF THE ATLANTIC COAST LINE RAILROAD COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIRLINE RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY TO THE REQUEST BY APPLICANT FOR EXTENSION OF TEMPORARY AUTHORITY

Come now the Atlantic Coast Line Railroad Company, the Baltimore & Ohio Railroad Company, Louisville & Nashville Railroad Company, The New York, New Haven and Hartford Railroad Company, The Pennsylvania Railroad Company, Seaboard Air Line Railroad Company and Southern Railway Company and file this, their reply in opposition to the applicant's request for extension of temporary authority, and assign as grounds, therefore, the following:

1. By order of May 18, 1955 the Commission has granted applicant certain intercoastal temporary authority [fol. 16] until November 14, 1955.
2. The protestant railroads above named oppose any extension of this grant for the same reasons as those set forth in their petition for reconsideration filed in this proceeding and dated June 2, 1955.
3. Section 311 (a) which is the sole source of the Commission's power to issue an order granting temporary authority such as the Commission's said order of

May 18, 1955, explicitly limits said power by providing that such temporary authority shall be valid for "not more than an aggregate of 180 days." An order of the Commission extending temporary authority responsive to the applicant's request beyond November 14, 1955, that is, for more than an aggregate of 180 days, would therefore be arbitrary, capricious and unlawful. *Stowe's Express* v. *United States*, 122 F. Supp. 955 (D. Mass., May 25, 1954).

Wherefore, the above-listed railroads respectfully pray that the Commission deny the applicant's request for extension of temporary authority granted it by the Commission's order of May 18, 1955.

Respectfully submitted, Charles T. Abeles, James A. Bistline, Anthony P. Donadio, U. B. Ellis, Carl [fol. 17] Helmetag, Jr., W. Q. Keenan, Prime F. Osborn, III., Attorneys for Protestants.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the applicant and all persons with interests allied to the applicant by mailing by first-class mail 25 copies thereof to David G. Macdonald, Esq., Cafritz Building, 1625 K Street, N. W., Washington 6, D. C.

Dated at New Haven, Connecticut, this 13th day of October, 1955.

W. Q. Keenan, 54 Meadow Street, New Haven, Connecticut.

[fol. 18] EXHIBIT NO. 17 TO FIRST AMENDED COMPLAINT

ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 28th day of October, A. D. 1955

No. W-376 (Sub-No. 11)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE

No. W-376 (Sub-No. 12)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE (2)

It appearing, That by order of May 18, 1955, the Commission, division 4, granted Pan-Atlantic Steamship Corporation temporary authority to operate as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation (1) of passengers and commodities generally (a) from Philadelphia, Pa., Baltimore, Md., Charleston, S. C., Jacksonville and Miami, Fla., to Seattle, Wash., Portland, Oreg., San Francisco, Oakland, Alameda and Los Angeles Harbor, Calif., (b) from San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor, to Boston, Mass., New York Harbor, N. Y., Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (c) from Seattle and Portland to Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (2) of passengers between New Orleans, La., and Houston, Tex., on the one hand, and, on the other, Seattle, Portland, San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor.

It further appearing, That there is a public need for continuance of the said water carrier service, that it is an activity of a continuing nature, and that this service corresponds in part with that which the carrier by application No. W-376 (Sub-No. 13) seeks a certificate of public convenience and necessity; and good cause appearing therefor:

It is ordered, That said carrier be, and it is hereby, authorized to continue to perform said water carrier service until further order of the Commission, but not beyond the time said application No. W-376 (Sub-No. 13) has been finally determined.

By the Commission, division 4.

[Seal] Harold D. McCoy, Secretary.

[fol. 19] EXHIBIT No. 18 TO FIRST AMENDED COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

No. W-376 (Sub-No. 11)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE

No. W-376 (Sub-No. 12)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE (2)

PETITION BY THE ATLANTIC COAST LINE RAILROAD COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY FOR RECONSIDERATION OF THE COMMISSION'S ORDER OF OCTOBER 28, 1955 CONTINUING TEMPORARY AUTHORITY.

Come now the railroads above named, protestants herein and file this, their petition for reconsideration of the Commission's order of October 28, 1955 extending beyond 180 days the temporary authority granted Pan-Atlantic Steamship Corporation by the Commission's order herein of May 18, 1955, and assign as their grounds therefore the following:

(1) Pursuant to application filed under the provisions of section 311(a) of the Inter-tate Commerce Act, the Com-

mission issued an order dated May 18, 1955 granting to Pan-Atlantic Steamship Corporation temporary authority to operate as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation (1) of passengers and commodities generally (a) from Philadelphia, Pa., Baltimore, Md., Charleston, S. C., Jackson-[fol. 20] ville and Miami, Fla., to Seattle, Wash., Portland, Oreg., San Francisco, Oakland, Alameda and Los Angeles Harbor, Calif., (b) from San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor to Boston, Mass., New York Harbor, N. Y., Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (c) from Seattle and Portland to Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (2) of passengers between New Orleans, La., and Houston, Tex., on the one hand, and, on the other, Seattle, Portland, San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor, beginning with the date of said order.

(2) The applicant herein has filed an application, pursuant to section 309 of the Interstate Commerce Act under Docket No. W-376 (Sub-No. 13) which seeks a certificate of public convenience and necessity corresponding in part with the grant of temporary authority made by the Commission's said order of May 18, 1955. The application in Docket No. W-376 (Sub-No. 13) is still pending.

(3) By order of the Commission, Division 4, dated October 28, 1955 Pan-Atlantic Steamship Corporation is authorized to continue to perform water carrier service under said grant of temporary authority until further order of the Commission, but not beyond the time said application W-376 (Sub-No. 13) has been finally determined.

[fol. 21] (4) Thus the Commission, by its said order of October 28, 1955, has attempted to make said grant of temporary authority, dated May 18, 1955 valid for more than an aggregate of 180 days.

(5) Section 311(a), which is the sole source of the Commission's power to issue an order granting temporary authority such as the Commission's said order of May 18, 1955, explicitly limits said power to the granting of only such temporary authority as "shall be valid for such time as the Commission shall specify but not for more than an aggregate of 180 days." An order of the Commission ex-

tending such a grant of temporary authority as was made by the Commission's said order herein of May 18, 1955 beyond a period of 180 days is therefore arbitrary, capricious, and unlawful, *Stone's Express vs. United States*, 122 F. Supp. 955 (D. Mass., May 25, 1954).

(6) The protestant railroads above named oppose any extension of this grant for the further reasons which are set forth in their petition for reconsideration filed in this proceeding and dated June 2, 1955, which the Commission is respectfully requested to incorporate in this pleading by reference thereto.

Wherefore, your petitioners respectfully pray that the Commission, pursuant to section 17(6) of the Interstate Commerce Act reconsider its said order of October 28, 1955 extending said grant of temporary authority, and that [fol. 22] pursuant to section 17(7) of the Interstate Commerce Act the Commission, upon such reconsideration find that particular order is unjust and unwarranted and therefore reverse said order by vacating it.

Respectfully submitted, Charles T. Abeles, James A. Bistline, Anthony P. Donadio, U. B. Ellis, Carl Helmetag, Jr., W. Q. Keenan, Prime F. Osborn, III, Attorneys for Protestants.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the applicant and all persons with interests allied to the applicant by mailing by first-class mail 25 copies thereof to David G. Macdonald, Esq., Cafritz Building, 1625 K Street, N. W., Washington 6, D. C.

Dated at New Haven, Connecticut, this 23rd day of November, 1955.

W. Q. Keenan, 54 Meadow Street, New Haven, Conn.

[fol. 23] EXHIBIT NO. 19 TO FIRST AMENDED COMPLAINT

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 9th day of January, A. D. 1956

No. W-376 (Sub-No. 11)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE

No. W-376 (Sub-No. 12)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE (2)

Upon consideration of the record in the above-entitled proceedings, joint petition of The Atlantic Coast Line Railroad Company, The Baltimore & Ohio Railroad Company, Louisville & Nashville Railroad Company, The Pennsylvania Railroad Company, Seaboard Air Line Railroad Company, and Southern Railway Company for reconsideration, and the reply thereto of applicant; and it appearing that the reasons set forth in support of said petition do not present good and sufficient cause to warrant granting of the petition:

It is ordered, That the said petition be, and it is hereby, denied.

By the Commission.

[Seal] Harold D. McCoy, Secretary.

[fol. 24] IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

[Title omitted]

MOTION OF INTERSTATE COMMERCE COMMISSION FOR LEAVE TO INTERVENE—Filed April 16, 1956

Comes now the Interstate Commerce Commission and pursuant to Section 2323, Title 28, of the United States Code moves the Court for leave to intervene, as of right, as a party defendant in the above entitled cause, enters the appearance of its counsel herein, and files herewith a motion to strike certain matter from the Plaintiffs' complaint.

(S.) Robert W. Ginnane, General Counsel, (S.) James A. Murray, Associate General Counsel, Attorneys for the Interstate Commerce Commission, Washington 25, D. C.

[File endorsement omitted.]

[fol. 25] IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

[Title omitted]

MOTION OF PAN-ATLANTIC STEAMSHIP CORPORATION FOR LEAVE TO INTERVENE—Filed April 13, 1956

Comes now Pan-Atlantic Steamship Corporation, a corporation organized and existing under the laws of the state of Delaware with general offices at Mobile, Alabama, the holder of the temporary operating authority issued by the Interstate Commerce Commission, the extension of which authority is the subject of the complaint in this proceeding, and respectfully moves the court for leave to intervene as a defendant in this action pursuant to Rule 24 of the Rules of Civil Procedure of the District courts of the United States and pursuant to the provisions of Sec. 2323, Title 28, U. S. Code.

Wherefore, Pan-Atlantic Steamship Corporation respectfully prays that it be permitted to intervene in this action as a party defendant and that it be granted leave to file the Motion to Strike and Answer to the Complaint as attached hereto, and such other pleadings as may be necessary in this matter.

Pan-Atlantic Steamship Corporation by its Attorney, (S.) James Julian Weinstein, 1 Court Street, Boston 8, Massachusetts.

Of Counsel:

David G. Macdonald, Warren Price, Jr., MacLeay, Lynch & Macdonald, William H. Armbrecht, Jr.

[File endorsement omitted.]

[fol. 26] United States District Court, District of Massachusetts

[Title omitted]

Order Allowing Intervention of Pan-Atlantic Steamship Corporation—April 16, 1956

This cause coming on to be heard on the motion of Pan-Atlantic Steamship Corporation for leave to intervene as a party defendant, and the court having considered said motion and the answer to the complaint tendered therewith and it appearing to the court that the said Pan-Atlantic Steamship Corporation should be permitted to intervene as prayed, and the court being duly advised in the premises,

It Is Ordered, that Pan-Atlantic Steamship Corporation has leave to intervene in this cause, and is hereby made a party defendant to this cause; and the Motion to Strike and the Answer of said defendant, as attached to said Motion for leave to intervene, are hereby received.

Entered this 16 day of April 1956.

(S.) Wyzanski.

[File endorsement omitted.]

[fol. 27] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO THE PLAINTIFFS' FIRST AMENDED COMPLAINT—Filed May 7, 1956

The Interstate Commerce Commission, hereinafter called the Commission, intervening defendant in the above-entitled action, for answer to the plaintiffs' first amended complaint therein filed:

1

Admits the allegations of paragraphs 1 to 10, inclusive.

2

Admits, as to paragraph 11, the filing with the Commission of a document of the purport of Exhibit 13; but neither [fol. 28] admits nor denies the statements contained in this exhibit, or their relevancy to this proceeding, for the reason that the Commission, in the performance of its statutory duty to administer and enforce the Interstate Commerce Act, is now in the process of conducting inquiries into many of the matters therein alleged for the purpose of determining the truth or falsity of such allegations, whether the acts there alleged, if they occurred, constitute violations of the Interstate Commerce Act, and the action to be taken with respect thereto. These proceedings are entitled: Docket No. MC-F-5913, *Malcolm P. McLean—Control—Pan Atlantic Steamship Corporation and McLean Trucking Company;* Docket No. MC-F-5917, *Atlantic Coast Line Railroad et al.* v. *McLean Trucking Company et al.;* and Docket No. MC-F-5976, *Investigation of Common Control of McLean Trucking Company, Waterman Steamship Corporation and Pan-Atlantic Steamship Corporation.* Hearings have been held with respect thereto but no final decisions have been made by the Commission.

3

Admits the allegations in paragraphs 12 to 15, inclusive.

4

Denies the allegations of paragraph 16 insofar as the temporary authority involved in this proceeding is concerned.

5

Admits the allegations of paragraph 17.

6

In answer to the allegations of paragraph 18, admits that the operations of Pan-Atlantic, to some extent, are competitive with those of the plaintiffs, but neither admits [fol. 29] nor denies the other allegations for lack of knowledge or information.

7

Denies the allegations of paragraph 19 that plaintiffs have or will suffer any legal damages as the result of the matters involved in this action, but neither admits nor denies the conclusions of law asserted therein.

8

Admits the allegations of paragraph 20, subject to the possibility that the temporary authority may be terminated at an earlier date.

9

Neither admits nor denies the allegations in paragraph 21, for the reason that it has no knowledge of the amount of testimony that may be offered or the number of witnesses who may be called at the further hearings to be held in the Pan-Atlantic certificate application proceeding.

10

Denies the allegations of paragraph 22 that plaintiffs will suffer immediate and irreparable damage through the competition of Pan-Atlantic; neither admits nor denies the allegations of said paragraph concerning the time that

may be required for the conclusion of the Commission proceeding on the application of Pan-Atlantic for the reason that, while the proceeding will be processed with all possible despatch, it cannot be predicted when a final order will be entered; neither admits nor denies the allegations of said paragraph respecting the continuance of the tempo-
[fol. 30] rary authority pending review in the courts of the final order that may be entered by the Commission, for the reason that if judicial review is sought, the circumstances that will exist at that time cannot be anticipated.

11

For a further defense, the defendant Interstate Commerce Commission states that the sole issue in this proceeding is whether the temporary authority of the Pan-Atlantic Steamship Corporation, issued under authority of section 311(a) of the Interstate Commerce Act (49 U. S. C. 911(e)) by order of the Commission dated May 18, 1955, for a period of 180 days to expire with November 14, 1955 (Plaintiffs Exhibit 12), was lawfully extended by the order of the Commission dated October 28, 1955 (Plaintiffs' Exhibit 17) and section 9(b) of the Administrative Procedure Act (5 U. S. C. 1008) until the final determination of an application for a certificate of public convenience and necessity to continue the same operations authorized by the temporary authority, which application was filed with the Commission by the Pan-Atlantic Steamship Corporation on or about May 5, 1955 (Paragraph 6 of the first amended complaint), and not yet decided by the Commission. (See paragraphs 15 and 16 of the allegations and paragraphs B and C of the prayer in Plaintiffs' complaint). This defendant denies that the said order is invalid for the reasons assigned in Plaintiffs' complaint or for any reason whatever.

[fol. 31] Wherefore, having answered the first amended complaint, the defendant Interstate Commerce Commission prays that the relief sought therein be denied, that the complaint be dismissed, and that the Court enter such other or further orders or decrees as may be just and proper.

Respectfully submitted, (S.) Robert W. Ginnane, General Counsel, (S.) James A. Murray, Associ-

ate General Counsel, Attorneys for the Defendant Interstate Commerce Commission, Washington 25, D. C.

[fol. 32] CERTIFICATE OF SERVICE (omitted in Printing)

[fol. 33] IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

[Title omitted]

FIRST AMENDED ANSWER OF INTERVENING DEFENDANT, PAN-ATLANTIC STEAMSHIP CORPORATION—Filed May 9, 1956

1. The allegations set forth in Paragraph 1 of the first amended complaint respecting jurisdiction of this court are admitted.

2. The allegations set forth in Paragraph 2 of the first amended complaint are admitted.

3. The allegation set forth in Paragraph 3 of the first amended complaint with respect to the geographic operations of the plaintiffs is admitted, but the allegation as to the importance and significance of such operations is neither admitted nor denied, because intervening defendant is without knowledge with respect thereto.

4. The allegation as to the place of business of the plaintiff, New York, New Haven, and Hartford Railroad Company is admitted. The allegation as to the place of organization and residence of said plaintiff is neither admitted nor denied, because intervening defendant is without knowledge with respect thereto.

5. The allegations of Paragraph 5 of the first amended complaint are admitted, but by way of further answer intervening defendant states that said allegations are incomplete and that the operating authority of Pan-Atlantic [fol. 34] is as set forth in its permanent and temporary operating authorities as issued by the Interstate Commerce Commission.

6. The allegations set forth in Paragraph 6 of the first amended complaint are admitted.

7. The allegations set forth in Paragraph 7 of the first amended complaint are admitted.

8. The allegations set forth in Paragraph 8 of the first amended complaint are admitted.

9. The allegations set forth in Paragraph 9 of the first amended complaint are admitted.

10. The allegations set forth in Paragraph 10 of the first amended complaint are admitted.

11. The allegation in Paragraph 11 of the first amended complaint, that Exhibit 13 is the matter referred to in Paragraph 2 of Exhibit 16 is admitted; and by way of further answer intervening defendant states that, pursuant to the agreement reached on the record in the pre-hearing conference in this case, only the filing of said documents by plaintiffs is admitted, but the truthfulness or relevancy thereof is not admitted.

12. The allegations set forth in Paragraph 12 of the first amended complaint are admitted.

13. The allegations set forth in Paragraph 13 of the first amended complaint are admitted.

14. The allegations set forth in Paragraph 14 of the first amended complaint are admitted.

15. The allegations set forth in Paragraph 15 of the first amended complaint are admitted.

16. The allegations set forth in Paragraph 16 of the first amended complaint are denied insofar as the temporary authority granted in this proceeding is concerned.

17. The allegations set forth in Paragraph 17 of the first amended complaint are neither admitted nor denied, because intervening defendant is without knowledge with respect thereto.

[fol. 35] 18. The allegations set forth in Paragraph 18 of the first amended complaint as to loss of business and good will suffered by the plaintiffs in the past by operations of Pan-Atlantic are denied. Further allegations of said paragraph are neither admitted nor denied for the reason that they are merely speculative and argumentative.

19. The allegation set forth in Paragraph 19 of the first amended complaint as to losses sustained by plaintiffs in the past is denied, and the other allegations in said para-

graph are neither admitted nor denied for the reason that they are speculative and argumentative.

20. The allegations set forth in Paragraph 20 of the first amended complaint on information and belief are admitted, (the reference therein to 11(b) being interpreted as 6).

21. The allegations set forth in Paragraph 21 of the first amended complaint are neither admitted nor denied for the reason that Pan-Atlantic, the applicant in said proceeding for permanent authority, has completed its case and has no knowledge upon which to base an opinion with respect to the case to be presented by the protestants.

22. The allegation set forth in Paragraph 22 of the first amended complaint with respect to immediate and irreparable damage being suffered by plaintiffs through the competition of Pan-Atlantic is denied, and defendant neither admits nor denies the other allegations of said paragraph on the ground that such an answer would be merely speculative.

23. The allegations set forth in Paragraph 23 of the first amended complaint are admitted.

24. For further defense, intervening defendant states that this action involves an attack upon the validity of an order of the Interstate Commerce Commission dated October 28, 1955, in Docket No. W-376 (Sub-No. 11) and Docket No. W-376 (Sub-No. 12), *Pan-Atlantic Steamship Corporation—Temporary Authority*—Inter-coastal Trade, and intervening defendant further states that said order was made and issued within the Commission's statutory authority, Section 311(a) of the Interstate Commerce Act (49 U. S. C. 911(a)), and Section 9(b) of the Administrative Procedure Act (5 U. S. C. 1008). Intervening defendant [fol. 36] denies that said order is invalid for the reasons assigned in plaintiff's complaint or any reason whatever.

Wherefore, having fully answered the first amended complaint, intervening defendant prays that the relief sought therein be denied and the complaint be dismissed, and the court enter other or further orders, decrees or relief that may be just and proper.

Pan-Atlantic Steamship Corporation by its attorneys, (S.) Russell S. Bernhard, David G. Macdon-

ald, 1625 K Street, N. W., Washington 6, D. C., James Julian Weinstein, 1 Court Street, Boston 8, Massachusetts.

Of Counsel:

Macleay, Lynch & Macdonald, William H. Armbrecht, Jr., Warren Price, Jr.

Certificate of Service (omitted in Printing)

[fol. 37] [File endorsement omitted]

In United States District Court, District of Massachusetts

[Title omitted]

Plaintiffs' Motion for Summary Judgment—Filed May 3, 1956

The plaintiffs move for summary judgment in their favor by the granting of all of the relief requested in their complaint. This motion is made more than 20 days after commencement of the above-described action, and is made upon the complaint.

Plaintiffs assert as the ground for the granting of summary judgment the absence of any genuine issue as to the following material facts:

1. The Interstate Commerce Commission by order has issued to Pan-Atlantic Steamship Corporation authority to engage in intercoastal common carriage for 180 days.

2. The Interstate Commerce Commission has by order extended such authorization for an aggregate of more than 180 days.

3. Pan-Atlantic Steamship Corporation has provided intercoastal carrier services for more than an aggregate of 180 days pursuant to the orders aforesaid.

4. The aforesaid state of affairs will continue during the [fols. 38-39] pendency of a proceeding before the Inter-

state Commerce Commission arising out of an application by Pan-Atlantic for a permanent certificate of public convenience and necessity authorizing intercoastal carrier operations including those above referred to.

5. The temporary authority aforesaid issued to Pan Atlantic before Pan Atlantic became an applicant for the permanent certificate above referred to.

Respectfully submitted, W. Q. Keenan, 54 Meadow Street, New Haven, Connecticut, E. M. Sweeney, South Station, Boston, Massachusetts, Attorneys for Plaintiffs.

Of Counsel:

Charles T. Abeles, James A. Bistline, Anthony P. Donadio, U. B. Ellis, Carl Helmetag, Jr., Prime F. Osborn, III.

Certificate of Service (omitted in Printing)

[fol. 40] [File endorsement omitted]

In United States District Court, District of Massachusetts

[Title omitted]

Motion of Intervening Defendant, Pan-Atlantic Steamship Corporation for Summary Judgment—Filed May 9, 1956

Intervening defendant, Pan-Atlantic Steamship Corporation, moves for summary judgment in its favor by the granting of all of the relief requested in its first amended answer. This motion is made more than 20 days after commencement of the above-described action, and is made upon the pleadings and pursuant to the agreement of the parties in the record of the pre-hearing conference in this proceeding.

Intervening defendant asserts as the ground for the

granting of summary judgment the absence of any genuine issue as to the following material facts:

1. Pan-Atlantic Steamship Corporation applied to the Interstate Commerce Commission for a permanent certificate of public convenience and necessity to perform intercoastal common carrier water service on May 5, 1955, which application is presently pending before said Commission.

2. The said Commission on May 18, 1955, granted to Pan-Atlantic authority to perform for a period of one hundred eighty days a portion of the service included within the aforesaid application for permanent authority.

3. The said Commission on October 28, 1955, pursuant to an application of Pan-Atlantic under applicable rules of the Commission, issued an order finding that there is a [fol. 41.] public need for the continuance of the water carrier service being performed by Pan-Atlantic under its one hundred eighty day authority, that such service is an activity of a continuing nature, and that such service corresponds in part to the pending application for permanent authority, and authorizing Pan-Atlantic to continue such service beyond the expiration of said one hundred eighty day period and until the final determination of said application for permanent authority.

4. The attaining of a final determination of said application for permanent authority within a period of one hundred eighty days after the filing thereof was beyond the control of the applicant, Pan-Atlantic.

Respectfully submitted, (S.) Russell S. Bernhard, David G. Macdonald, 1625 K Street, N. W., Washington 6, D. C., James Julian Weinstein, 1 Court Street, Boston, Massachusetts, Attorneys for Pan-Atlantic Steamship Corporation.

Of Counsel:

Macleay, Lynch & Macdonald, William H. Armbrecht, Jr., Warren Price, Jr.

Certificate of Service (omitted in Printing)

[fol. 42] IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

ATLANTIC COAST LINE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, and SOUTHERN RAILWAY COMPANY, Plaintiffs,

v.

THE UNITED STATES OF AMERICA, Defendant,

and

INTERSTATE COMMERCE COMMISSION, and PAN-ATLANTIC STEAMSHIP CORPORATION, Intervening Defendants

OPINION— May 17, 1956

Before Magruder, Circuit Judge, and Ford and Wyzanski, District Judges.

[File endorsement omitted.]

[fol. 43] Per Curiam. The amended complaint herein seeks a decree from us setting aside an order of the Interstate Commerce Commission.

On or about May 5, 1955, Pan-Atlantic Steamship Corporation made application to the Commission for permanent authority to operate as a common carrier by water between certain Atlantic and Pacific ports.

While this application was pending, upon application by Pan Atlantic Steamship Corp. for temporary authority under § 311(a) of the Interstate Commerce Act, as amended (49 U. S. C. § 911(a)), the Commission issued its order on May 18, 1955, granting authority to Pan-Atlantic Steamship Corp. to operate as a common carrier by water between certain named Atlantic and Pacific ports, up to and including November 14, 1955.

Subsequently, by order entered October 28, 1955, the Commission authorized Pan-Atlantic Steamship Corp. to

continue to perform such temporary water carrier service, until further order of the Commission, but not beyond the time the pending application for permanent authority should have been determined. This order of October 28, 1955, is the one complainants seek to have us annul, on the ground that it constitutes an *ex parte* extension of temporary authority beyond the maximum period of 180 days prescribed in § 311(a). The Commission, on the other hand, claims that its more extended order is sanctioned by § 9(b) of the Administrative Procedure Act (60 Stat. 242).

This case is ruled in principle by the decision of this court in *Stone's Express, Inc. v. United States*, 122 F. Supp. 955 (1954). (Our judgment was subsequently vacated for [fol. 44] mootness pursuant to stipulation of the parties, *Interstate Commerce Commission v. Stone's Express, Inc.*, 350 U. S. 906 (1955).) Though that case involved the 180-day limitation in § 210a(b) of the Interstate Commerce Act (49 U. S. C. § 310a(b)), the issue as to the Commission's power is essentially the same. We think, consistent with the usual deference to precedent common in this Court, we should adhere to the conclusion reached in *Stone's Express, Inc. v. United States*, supra.

The plaintiffs' motion for summary judgment is granted, and a permanent injunction will be entered requiring the Commission to set aside and annul its order of October 28, 1955, in so far as that order continues the temporary operation previously authorized by the Commission.

WYZANSKI, *District Judge*. I concur exclusively on the ground that I always defer to an earlier decision by my brethren, except where the decision is remote in time, or except where the court seems to me to have been inescapably wrong. Neither of these conditions is present here. However, in order to make clear the desirability of a Supreme Court review of the problem, I add that were the matter *res integra*, and were I not, as I conceive, bound by the ruling in *Stone's Express, Inc. v. United States*, D. Mass., 122 F. Supp. 995 (1954), I should conclude that, by virtue of § 9(b) of the Administrative Procedure Act, 60 Stat. 242, the I. C. C. did not act *ultra vires* in entering its order of October 28, 1955. I am authorized to state that Judge Ford agrees with this view.

[fol. 45] In United States District Court, District of Massachusetts

Civil Action No. 56-232-W

Atlantic Coast Line Railroad Company, The Baltimore and Ohio Railroad Company, Louisville and Nashville Railroad Company, The Pennsylvania Railroad Company, Seaboard Air Line Railroad Company, Southern Railway System and The New York, New Haven and Hartford Railroad Company, Plaintiffs,

vs.

The United States of America, Defendant,

and

The Interstate Commerce Commission and Pan-Atlantic Steamship Corporation, Intervening Defendants

Judgment—May 25, 1956

This cause came on to be heard on the plaintiffs' motion for leave to amend their complaint and on the motions of the plaintiffs and of Pan-Atlantic Steamship Corporation, intervening defendant, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the verified first amended complaint and the answers thereto filed by Pan-Atlantic Steamship Corporation and the Interstate Commerce Commission, intervening defendants, and the answer of the United States filed responsively to the complaint, having found that there is no genuine issue as to any material fact and no controversial question of fact to be submitted to the Trial Court; and having concluded that plaintiffs are entitled to judgment as a matter of law,

It is hereby Ordered, Adjudged and Decreed:

(1) That the plaintiffs' motion for leave to file their first amended complaint is granted;

[fol. 46] (2) That the plaintiffs' motion for summary judgment is granted and Pan-Atlantic Steamship Corporation's motion for summary judgment is denied.

(3) That the order of the Interstate Commerce Commission dated October 28, 1955, entered in I. C. C. Docket

No. W-376 (Sub-Nos. 11 and 12) extending Pan-Atlantic Steamship Corporation's authority to engage in inter-coastal operations beyond a period of 180 days shall be, and it is hereby vacated, annulled and set aside.

Issued at Boston, Massachusetts, this 25th day of May, 1956.

(S.) Calvert Magruder, Judge of the United States Court of Appeals, (S.) Francis J. W. Ford, United States District Court Judge, (S.) Charles E. Wyzanski, Jr., United States District Court Judge.

[fol. 47] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

[Title omitted]

PETITION OF THE INTERSTATE COMMERCE COMMISSION FOR STAY OF JUDGMENT—Filed May 28, 1956

The Interstate Commerce Commission respectfully petitions this Court to stay, pursuant to Rule 62(c) and (e) of the Federal Rules of Civil Procedure, its judgment in the above-entitled case pending an appeal to the Supreme Court of the United States and the final disposition of that appeal, for the following reasons:

1. We are authorized by counsel for plaintiffs to say that the plaintiffs do not oppose the entry of an order staying the judgment in this case pending appeal to and final disposition of the appeal by the Supreme Court of the United States. We are further authorized to say that [fol. 48] this position is taken by the plaintiffs solely because a similar stay of judgment was allowed by this Court in the precedent case, *Stone's Express, Inc.* v. *United States, et al.*, 122 F. Supp. 955.

2. By order dated May 18, 1955, the Commission issued to Pan-Atlantic Steamship Corporation, under authority of section 311(a) of the Interstate Commerce Act (49 U. S. C. 911(a)) temporary authority to engage in exten-

sive water carrier operations as a common carrier of general commodities between numerous ports located on both the Atlantic and Pacific coasts of the United States. This temporary authority was issued only upon the careful consideration of evidence which convinced the Commission that there was an immediate and urgent need for this common carrier service and that there existed no other carrier service capable of meeting such need. This temporary authority was extended beyond the 180 days allowed by Section 311(a) under the assumed authority and requirements of section 9(b) of the Administrative Procedure Act (5 U. S. C. 1008(b)) upon a determination that the operation was continuing in nature and the licensee had met all other conditions of that statutory provision. This operation, obviously, involves the investment of large sums of money, the use of expensive ships and the employment of a large number of employees. If Pan-Atlantic should be compelled to discontinue this service pending appeal to and determination of the appeal by the Supreme Court, not only would it suffer severe damages, but more important from the standpoint of the administration of the Interstate Commerce Act, the public would be deprived of this needed common carrier service. On the other hand, the losses, if [fol. 49] any, that would be suffered by the plaintiffs as the result of the continued operation by Pan-Atlantic pending this appeal, or the determination of Pan-Atlantic's application for a certificate, whichever is earlier, is purely speculative. A stay of the Court's judgment is, therefore, warranted in order to maintain the status quo and to protect Pan-Atlantic, its employees, and shippers from losses which would result from the discontinuance of this operation.

3. On April 1, 1956, there were outstanding two water carrier temporary authorities issued under section 311(a) which had been extended under the assumed authority of section 9(b) of the Administrative Procedure Act. On the same date there were outstanding approximately 500 motor carrier temporary authorities issued under the very similar provisions of section 210a(a) which had been extended beyond 180 days under section 9(b) of the Administrative Procedure Act. During the year 1955, 39 water carrier temporary authorities were issued under section 311(a),

of which 3 were extended under section 9(b). During the same year, 2,767 motor carrier temporary authorities were issued under the corresponding section 210a(a), of which 508 were extended under section 9(b). It will thus be observed that this interpretation of section 9(b) of the Administrative Procedure Act which the Commission has followed since 1947 is extremely important in the administration of the Interstate Commerce Act and in the interest of the commerce of the United States which it is the purpose of that Act to serve. We submit, therefore, that this interpretation and practice which has been so long followed should not be disrupted or jeopardized by the making effective of a decree in this case prior to a review of the [fol. 50] matter by the Supreme Court.

4. The fact that this case was not decided on the merits of the particular case but solely upon the precedent established in *Stone's Express, Inc.* v. *United States, et al.*, 122 F. Supp. 955, and the fact that two of the participating Judges (including one who participated in the *Stone's* decision) indicated that their conclusions would have been different if this were a matter *res integra*, shows a difference of opinion which should be resolved by the Supreme Court. We submit that, under the circumstances, the decree should not be made effective prior to opportunity for such review by that Court.

5. In *Stone's Express, Inc., supra*, although the decision of the three-judge court was unanimous, the Court, by its judgment and decree of June 3, 1954, allowed time for appeal by requiring that the Commission "within (60) days" make and enter an order revoking the order in question. Subsequently, the Court, upon petition, by its order of June 28, 1954, stayed its decree until the final disposition by the Supreme Court of the appeal of this Commission. We submit that under the circumstances of the present case, there is even greater justification for a stay pending appeal and final disposition by the Supreme Court.

6. We further call attention to the fact that the Supreme Court noted probable jurisdiction in the appeal from the decision of the District Court in *Stone's Express, Inc.* v. *United States, supra* (348 U. S. 886), despite the pendency of a motion to affirm, thereby indicating that Court's view

that the questions are so substantial as to require plenary consideration, with briefs on the merits and oral argument, [fol. 51] for their resolution. The case was remanded to the District Court for dismissal as moot upon the suggestion of the parties: 350 U. S. 906.

In view of the above circumstances, it is respectfully submitted that a stay of the Court's decree should be granted pending an appeal to and determination by the Supreme Court. A draft of a Proposed Order is attached.

Interstate Commerce Commission, (S.) Robert W. Ginnane, General Counsel, (S.) James A. Murray, Associate General Counsel, Washington 25, D. C.

Certificate of Service (omitted in Printing)

[fol. 52] In United States District Court, District of Massachusetts

[Title omitted]

Order Granting Stay of Judgment Pending Appeal to and Final Disposition of Appeal by the Supreme Court

The Court having considered the petition filed by the defendant Interstate Commerce Commission and the statement in support thereof filed by Pan-Atlantic Steamship Corporation for a stay of the Court's judgment and order entered on May 25, 1956, pending an appeal to and the disposition of the appeal by the Supreme Court of the United States,

And it appearing to the Court, that the granting of the said petition is not opposed by plaintiffs; and the Court [fol. 53] being fully advised in the premises:

It is ordered, adjudged and decreed, That the said judgment and order of this Court entered on May 25, 1956, in the above-entitled case, be, and it is hereby, stayed for a period of 60 days pending appeal by the Interstate Commerce Commission to the Supreme Court of the United

States and, in the event of such appeal, the judgment and order is hereby further stayed pending the final disposition of such appeal by the Supreme Court.

(S.) Calvert Magruder, Circuit Judge, (S.) Francis J. W. Ford, District Judge, (S.) Charles E. Wyzanski, Jr., District Judge.

[fol. 54] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

[Title omitted]

NOTICE OF APPEAL BY THE INTERSTATE COMMERCE COMMISSION TO THE SUPREME COURT OF THE UNITED STATES—Filed July 17, 1956

I

Notice is hereby given that the Interstate Commerce Commission, an intervening defendant in the above-entitled civil action, hereby appeals to the Supreme Court of the United States from the final judgment entered in the action on May 25, 1956.

This appeal is taken pursuant to 28 U. S. C. 1253.

II

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

[fol. 55] (a) Order of March 19, 1956 by United States Circuit Judge Calvert Magruder appointing himself, and United States District Judges J. W. Ford and Charles E. Wyzanski, Jr., to hear this case;

(b) Plaintiffs' first amended complaint;

(c) Exhibits attached to the original complaint and referred to in the plaintiffs' first amended complaint, as follows: Nos. 12, 15, 16, 17, 18 and 19;

(d) Motion of the Interstate Commerce Commission for leave to intervene;

(e) Motion of the Pan-Atlantic Steamship Corporation for leave to intervene;

(f) Orders of the Court granting motions for leave to intervene;

(g) Answer of the Interstate Commerce Commission to plaintiffs' first amended complaint;

(h) First amended answer of Pan-Atlantic Steamship Corporation to plaintiffs' first amended complaint;

(i) Plaintiffs' motion for summary judgment;

(j) Motion of Pan Atlantic Steamship Corporation for summary judgment;

(k) Opinion of the Court, including separate statement of Judge Wyzanski;

(l) Judgment of the Court, entered May 25, 1956;

(m) Petition of the Interstate Commerce Commission for stay of judgment pending appeal;

(n) Statement of Pan-Atlantic Steamship Corporation in support of petition of the Interstate Commerce Commission for stay of judgment pending appeal;

(o) Order of May 29, 1956, by the Court, staying its judgment and order of May 25, 1956, pending appeal;

(p) This notice of appeal.

[fol. 56] III

The following question is presented by this appeal:

Whether section 9(b) of the Administrative Procedure Act (5 U. S. C. 1008(b)) extended or authorized or required the Commission to extend beyond 180 days, a temporary authority issued to Pan-Atlantic Steamship Corporation under section 311(a) of the Interstate Commerce Act (49 U. S. C. 911(a)) authorizing operation as a common carrier by water, where the common carrier operation was of a continuing nature and Pan-Atlantic had filed a timely and sufficient application for a certificate of public convenience and necessity to continue the same operations conducted under the temporary authority, which application had

not been finally determined by the Commission upon the expiration of the 180 days of operation allowed by the temporary authority.

Robert W. Ginnane, General Counsel, James A. Murray, Associate General Counsel, Attorneys for the defendant Interstate Commerce Commission. Washington 25, D. C.

[fol. 57] Proof of Service (omitted in Printing)

[fol. 58] [File endorsement omitted]

In United States District Court, District of Massachusetts

[Title omitted]

Notice of Appeal by the Pan-Atlantic Steamship Corporation to the Supreme Court of the United States—Filed July 25, 1956

I

Notice is hereby given that Pan-Atlantic Steamship Corporation, an intervening defendant in the above-entitled civil action, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on May 25, 1956.

This appeal is taken pursuant to 28 U. S. C. 1253 and 2101(b).

II

The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in the said transcript the following:

(a) First amended complaint, dated April 30, 1956, filed by Atlantic Coast Line Railroad Company, et al, plaintiffs, including the following exhibits adopted by reference in the first amended complaint and appearing as exhibits

attached to the original complaint filed by said plaintiffs, dated March 9, 1956; numbers 12; 15, 16; 17; 18; and 19;

[fol. 59] (b) Motion of Interstate Commerce Commission for leave to intervene as defendant;

(c) Motion of Pan-Atlantic Steamship Corporation for leave to intervene as defendant;

(d) Order of Court granting motions to intervene;

(e) Answer of Interstate Commerce Commission, Intervening Defendant, to amended complaint;

(f) First Amended Answer of Intervening Defendant, Pan-Atlantic Steamship Corporation, to amended complaint;

(g) Motion of Plaintiffs for summary judgment;

(h) Motion of Pan-Atlantic Steamship Corporation, Intervening Defendant, for summary judgment;

(k) Opinion of Court, dated May 17, 1956;

(l) Judgment of Court, dated May 25, 1956;

(m) Petition of Interstate Commerce Commission, Intervening Defendant, for Stay of Judgment, pending appeal;

(n) Statement of Pan-Atlantic Steamship Corporation, Intervening Defendant, in support of petition of Interstate Commerce Commission for stay;

(o) Order of Court dated May 29, 1956, staying judgment;

(p) This notice of appeal;

III

The following questions are presented by this Appeal:

First Question: Whether section 9(b) of the Administrative Procedure Act (5 U. S. C. 1008(b)) extended or authorized or required the Commission to extend beyond 180 days, a temporary authority issued to Pan-Atlantic Steamship Corporation under section 311(a) of the Interstate Commerce Act (49 U. S. C. 911(a)) authorizing operation as a common carrier by water, where the common carrier operation was of a continuing nature and Pan-Atlantic had filed a timely and sufficient application for a certificate of public convenience and necessity to continue the same operations conducted under the temporary authority, which application had not been finally determined by

the Commission upon expiration of the 180 days of operation allowed by the temporary authority.

[fol. 60] *Second Question:* Whether the District Court was in error in this case by following its decision in *Stone's Express Inc.*, v. *Interstate Commerce Commission*, 122 F. Supp. 955, under the doctrine of *stare decisis*, in view of the fact that the Supreme Court of the United States noted probable jurisdiction in the *Stone's Express Case*, 348 U. S. 885, 99 L. Ed. 696, and subsequently vacated said judgment and remanded the case to the District Court for dismissal of the proceedings in accordance with the stipulation of the parties as to mootness, 350 U. S. 906, 100 L. Ed. (adv. p. 125), and when two of the three judges in this case stated in their concurring opinion that where the matter *res integra* they would have entered judgment for the defendants in this case?

Russell S. Bernhard, David G. Macdonald, James J. Weinstein, Attorneys for Pan-Atlantic Steamship Corporation, Intervening Defendant.

[fol. 60] Proof of Service (omitted in Printing)

[fol. 61] [File endorsement omitted]

In United States District Court, District of Massachusetts

[Title omitted]

Amendment to Designation or Record to Be Certified
Filed August 6, 1956

Pan Atlantic Steamship Corporation herewith amends its requests to the Clerk to prepare a transcript of record in this cause for transmission to the Clerk of the Supreme Court of the United States (a) by striking and excluding therefrom Items (m) and (n) which were set forth therein as follows:

"(m) Petition of Interstate Commerce Commission, Intervening Defendant, for Stay of Judgment, pending appeal;

"(n) Statement of Pan-Atlantic Steamship Corporation,

Intervening Defendant, in support of petition of Interstate Commerce Commission for stay;" and (b) by adding this amended designation, together with Proof of Service thereof.

(S.) David G. Macdonald, Russell S. Bernhard, James J. Weinstein, Attorney for Pan-Atlantic Steamship Corporation, Intervening Defendant.

Washington, D. C. August 2, 1956.

[fol. 62] Proof of Service (omitted in Printing)

[fol. 63] In United States District Court, District of Massachusetts

[Title omitted]

Amendment to Notice of Appeal by the Interstate Commerce Commission to the Supreme Court of the United States—Filed August 8, 1956

The Interstate Commerce Commission hereby amends its request to the Clerk to prepare a transcript of the record in the above entitled cause for transmission to the Clerk of the Supreme Court of the United States, (a) by striking and excluding therefrom items (m) and (n), which were set forth therein as follows:

"(m) Petition of the Interstate Commerce Commission for stay of judgment pending appeal;

(n) Statement of Pan-Atlantic Steamship Corporation in support of petition of the Interstate Commerce Commission for stay of judgment pending appeal;"

and (b) by adding this amendment, together with proof of service thereof.

Interstate Commerce Commission (S.) Robert W. Ginnane, General Counsel, (S.) James A. Murray, Associate General Counsel.

[File endorsement omitted.]

Washington 25, D. C., August 6, 1956.

[fol. 64] Proof of Service (omitted in Printing)

[fol. 65] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 66] Supreme Court of the United States, October Term, 1956

No. 408

Pan-Atlantic Steamship Corporation, Appellant,

vs.

Atlantic Coast Line Railroad Company, et al.

Appeal from the United States District Court for the District of Massachusetts.

Order Noting Probable Jurisdiction—November 19, 1956

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

[fol. 67] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 424

INTERSTATE COMMERCE COMMISSION, Appellant,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, et al.

Appeal from the United States District Court for the District of Massachusetts.

ORDER NOTING PROBABLE JURISDICTION—November 19, 1956

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar and assigned for argument immediately following No. 408.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 408

PAN-ATLANTIC STEAMSHIP CORPORATION, *Appellant*

v.

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, SOUTHERN RAILWAY SYSTEM, AND THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Appellees*

Appeal from the United States District Court for the District of Massachusetts

JURISDICTIONAL STATEMENT

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Certificate of Service 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

PAN-ATLANTIC STEAMSHIP CORPORATION, *Appellant*

v.

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, SOUTHERN RAILWAY SYSTEM, AND THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Appellees*

Appeal from the United States District Court for the District of Massachusetts

---

JURISDICTIONAL STATEMENT

In accordance with Rule 15 of the Revised Rules of the Supreme Court of the United States, Pan-Atlantic Steamship Corporation, intervening defendant in the Court below, presents this its statement as to jurisdiction, and in support thereof respectfully states:

OPINIONS BELOW

(a) The opinion of the United States District Court for the District of Massachusetts in this case is reprinted herein as Appendix "A".

The opinion of the United States District Court for the District of Massachusetts in *Stone's Express, Inc.* v. *United States,* 122 F. Supp. 955, which was held by the Court below to rule in principle the decision in this case, is reprinted herein as Appendix "B".

The order of the Interstate Commerce Commission, which was the subject matter of the suit in the lower court is reprinted herein as Appendix "C".

JURISDICTION

(b) (i) The appellees, Atlantic Coast Line Railroad Company, et al, instituted suit against the United States of America before the United States District Court on March 9, 1956, under the provisions of Sections 1336 and 2321 through 2325 of the Judicial Code (28 U. S. C. 1336, and 2321 through 2325) and Sections 17(9), 311(a) and 316(a) of the Interstate Commerce Act (49 U. S. C. 17(9), 911(a) and 916(a)).

The Interstate Commerce Commission and Pan-Atlantic Steamship Corporation moved for leave to intervene as parties defendant pursuant to Section 2323 of the Judicial Code (29 U. S. C. 2323), which motions were granted by the District Court.

This appeal seeks review of the action of the District Court in vacating, annulling, and setting aside the order of the Interstate Commerce Commission dated October 28, 1955, entered in Interstate Commerce Commission Docket No. W-376 (Sub Nos. 11 and 12). The said order of the Commission extended the temporary au-

thority of Pan-Atlantic Steamship Corporation to engage in inter-coastal operations beyond the initial period of 180 days, for which such temporary authority was originally granted, until the final determination by the Commission of the pending application of Pan-Atlantic Steamship Corporation for a permanent certificate of public convenience and necessity covering that operation.

(ii) The judgment appealed from was entered by the District Court on May 25, 1956, and is reproduced herein as Appendix "D". Notice of Appeal to this Court was filed on July 24, 1956, with the Clerk of the United States District Court for the District of Massachusetts.

(iii) The jurisdiction of this court is invoked under the provisions of Section 1253 of the Judicial Code (28 U. S. C. 1253).

(iv) The jurisdiction of this Court is believed to be sustained by a number of decisions of this court, including:

American Trucking Assoc. Inc. v. *U. S.*, 344 U. S. 298, 73 S. Ct. 307, 97 L. Ed. 337
Riss and Co. v. *U. S.*, 341 U. S. 907, 71 S. Ct. 617, 95 L. Ed. 1345
Alton R. Co. v. *U. S.*, 315 U. S. 15, 62 S. Ct. 432, 86 L. Ed. 586
U. S v. *Maher*, 307 U. S. 148, 59 S. Ct. 768, 83 L. Ed. 1162

STATUTES INVOLVED

The essential issues decided by the Interstate Commerce Commission and by the lower court in the proceedings giving rise to this appeal required construction and application of Sections 210a and 311 of the

Interstate Commerce Act (49 U. S. C. 310a, 911) and Section 9(b) of the Administrative Procedure Act (5 U. S. C. 1008). The full text of Sections 210a and 311 of the Interstate Commerce Act and the pertinent provision of Section 9(b) of the Administrative Procedure Act, being directly before this Court for interpretation and application, are set forth verbatim:

Section 210a—Interstate Commerce Act

(a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but not for more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

(b) Pending the determination of an application filed with the Commission for approval of a consolidation or merger of the properties of two or more motor carriers, or of a purchase, lease or contract to operate the properties of one or more motor carriers, the Commission may, in its discretion, and without hearings or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days, of the operation of the motor carrier properties sought to be acquired by the person proposing in such pending application to acquire such properties, if it shall appear that failure to grant such temporary approval may result in destruction of or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their

future usefulness in the performance of adequate and continuous service to the public.

Section 311—Interstate Commerce Act

(a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such a need, the Commission may, in its discretion and without hearings, or other proceedings, grant temporary authority for such service by a common carrier by water or a contract carrier by water, as the case may be. Such temporary authority shall be valid for such time as the Commission shall specify but not for more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

(b) Pending the determination of an application filed with the Commission under this Act for approval of a consolidation or merger of the properties of two or more water carriers, or of a purchase, lease or contract to operate the properties of one or more water carriers, the Commission may, for good cause shown, and without hearings or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days, of operation of the properties of such carriers by water by the person proposing to acquire them, as aforesaid.

Section 9(b)—Administrative Procedure Act.

(b) Licenses. * * * In any case in which the license has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

QUESTIONS PRESENTED

The following questions are presented by this Appeal:

First Question: Whether Section 9(b) of the Administrative Procedure Act (5 U. S. C. 1008(b)) extended, or authorized or required the Commission to extend, beyond 180 days a temporary authority issued to Pan-Atlantic Steamship Corporation under Section 311(a) of the Interstate Commerce Act (49 U. S. C. 911(a)) authorizing operation as a common carrier by water, where the common carrier operation was of a continuing nature and Pan-Atlantic had filed a timely and sufficient application for a certificate of public convenience and necessity to continue the same operations conducted under the temporary authority, which application had not been finally determined by the Commission upon expiration of the 180 days of operation allowed by the temporary authority?

Second Question: Whether the District Court was in error in this case by following its decision in *Stone's Express, Inc.* v. *United States,* 122 F. Supp. 955, under the doctrine of *stare decisis,* in view of the fact that the Supreme Court of the United States noted probable jurisdiction in the appeal of that case, *Interstate Commerce Commission* v. *Stone's Express, Inc.,* 348 U. S. 885, 75 S. Ct. 205, 99 L. Ed. 696, and subsequently vacated said judgment and remanded the case to the District Court for dismissal of the proceedings in accordance with the stipulation of the parties as to mootness, 350 U. S. 906, 76 S. Ct. 190, 100 L. Ed. (adv. p. 125), and when two of the three judges in this case stated in their concurring opinion that were the matter *res integra,* they would have entered judgment for the defendant in this case?

STATEMENT OF THE CASE

On May 6, 1955, Pan-Atlantic Steamship Corporation, (hereinafter referred to as Pan-Atlantic), filed an application with the Interstate Commerce Commission (hereinafter referred to as the Commission) under Section 309 of the Interstate Commerce Act (49 U. S. C. 909) for a permanent certificate of public convenience and necessity to transport freight and passengers as a common carrier by water between certain ports on the East and West coasts of the United States. The same day, to provide service responsive to an urgent and immediate public need, Pan-Atlantic filed with the Commission an application, under the provisions of Section 311(a) of the Interstate Commerce Act (49 U. S. C. 911(a)) for temporary authority for a period of 180 days to render the same service covered by its application for a permanent certificate. The application for such temporary authority was granted by an order of the Commission dated May 18, 1955, with an expiration date of November 14, 1955.

On or about September 30, 1955, Pan-Atlantic made a timely application to the Commission, in accordance with applicable Agency rules which had been published by the Commission (49 C. F. R. 2.1-2.4) under Section 9(b) of the Administrative Procedure Act (5 U. S. C. 1008(b)), for a continuation of its temporary authority, until its application for permanent authority had been finally determined. On October 28, 1955, the Commission issued an order (Appendix C hereto) containing the following findings of fact: that the public need required a continuance of the service which Pan-Atlantic had been providing under its temporary authority, that the said activity of Pan-Atlantic was of a continuing nature, and that the service being

provided under the temporary authority by Pan-Atlantic was contained within the scope of the application of Pan-Atlantic for a permanent certificate. On the basis of these findings, the Commission authorized the continuance of said temporary operation until the time of final determination of the application for permanent authority.

A petition for reconsideration of said order of October 28, 1955, was filed by the same railroads that are appellees in this case, and said petition was denied by the Commission by order dated January 9, 1956. The said railroads then filed suit on March 13, 1956, to set aside the order of the Commission dated October 28, 1955, and to require it to order discontinuance of said water carrier service by Pan-Atlantic.

THE QUESTIONS ARE SUBSTANTIAL

The paramount issue in this appeal has never been decided by this Court. The lower Court found it to be substantially the same as that raised on appeal to this Court from the decision in *Stone's Express, Inc.* v. *United States,* 122 F. Supp. 955, in which probable jurisdiction was noted by this Court (*Interstate Commerce Commission* v. *Stone's Express, Inc.,* 348 U. S. 885, 99 L. Ed. 696, 75 S. Ct. 205), but which was remanded to the District Court for dismissal as moot upon request of the parties (350 U. S. 906, 100 L. Ed. (adv. p. 125), 76 S. Ct. 190).

That issue is whether the provision of Section 9(b) of the Administrative Procedure Act, which perpetuates temporary licenses issued by Federal agencies for activities of a continuing nature during the pendency of applications for renewal or new licenses covering

such activities, is applicable to temporary licenses granted under the Interstate Commerce Act.

(a) The Decision in This Case, in Substance, Presents a Direct Conflict With the Decision of Another Three-Judge District Court Upon an Important Question of Federal Law.

The issue of whether Section 9(b) of the Administrative Procedure Act applies to temporary licenses issued under the Interstate Commerce Act was litigated for the first time in *Stone's Express, Inc.* v. *United States, supra.* The only other time this question has been litigated has been in this case.

In both these instances, action was brought in the District of Massachusetts. One District Judge sat in both cases, but the Circuit Judge and the other District Judge were different in the two cases.

In the *Stone's Express Case, supra,* the three-judge Court concluded that Section 9(b) of the Administrative Procedure Act did not apply to temporary licenses issued under Section 210a(b) of the Interstate Commerce Act. In the present case, which arose under Section 311(a) of the Interstate Commerce Act, the three-judge Court after finding the two cases to be the same in principle, applied the rule of *stare decisis,* solely out of respect for their brethren in the same District, and adhered to the decision in the *Stone's Express Case, supra.*

However, two of the three judges in this case (one of whom was the District Judge who also sat in the *Stone's Express Case*) issued the following concurring opinion:

> Wyzanski, *District Judge:* "I concur exclusively on the ground that I always defer to an earlier decision by my brethren, except where the decision is remote in time, or except where the Court

> seems to me to have been inescapably wrong. Neither of these conditions is present here. However, in order to make clear the desirability of a Supreme Court review of the problem, I add that were the matter *res integra* and were I not, as I conceive, bound by the ruling in *Stone's Express, Inc.* v. *United States,* D. Mass. 122 F. Supp. 995 (1954) I should conclude that, by virtue of Sec. 9(b) of the Administrative Procedure Act, 60 Stat. 242, the I. C. C. did not act *ultra vires* in entering its order of October 28, 1955. I am authorized to state that Judge Ford agrees with this view".

If the concurring opinion by a majority of the Court—which represents the substantive opinion in this case—is considered, rather than the formal decision itself, then a direct conflict between the decisions in the *Stone's Express Case* and this case upon an important question of Federal Law is squarely presented. This Court, as a matter of course, has always taken jurisdiction of cases involving a direct conflict between decisions of Courts of Appeals involving the construction and application of Federal Statutes. Since three-judge District Courts act in a reviewing capacity from which appeal to this Court lies, the same principle is applicable to such conflicts between decisions of three-judge District Courts.

McGrath v. *Manufacturers Trust Co.,* 338 U. S. 241, 70 S. Ct. 4, 94 L. Ed. 31
United States v. *Aetna Casualty Co.,* 338 U. S. 366, 70 S. Ct. 207, 94 L. Ed. 171

(b) The Decision of the District Court Imperils the Continued Existence of Several Hundred Carriers

Section 9(b) of the Administrative Procedure Act was enacted for the dual purpose of protecting persons, conducting activities under temporary or expiring

licenses issued by Federal agencies, from suffering undue hardship, attributable to delays in the administrative procedure beyond the control of such persons, while awaiting agency decisions on their timely filed applications for new or renewal authority, and of protecting the public against a cessation of those needed services pending action by the agency on those applications.

The Interstate Commerce Commission is one of the largest Federal licensing agencies. Its docket is, and long has been, a very crowded one. Applications to obtain permanent certificates of public convenience and necessity, almost without exception, require administrative proceedings lasting more than 180 days until final determination by the Commission. This situation is precisely the type that Section 9(b) of the Administrative Procedure Act was designed to meet.

Nowhere in the Administrative Procedure Act, or in its legislative history, is there any evidence or indication that Congress intended temporary licenses issued by the Interstate Commerce Commission to be exceptions to the relief provisions of Section 9(b) of the Administrative Procedure Act. In fact, the legislative history is precisely to the contrary, as is the long-settled construction of and practice under that Section by the Commission.

Commencing in 1946, when the Administrative Procedure Act became law, the Interstate Commerce Commission proceeded with full confidence that Section 9(b) of the Administrative Procedure Act applied to temporary licenses issued by it pursuant to Section 210a and 311 of the Interstate Commerce Act. Appropriate regulations were issued by the Commission gov-

erning the operation of Section 9(b) in its application to such temporary licenses (49 C. F. R. 2.1-2.4), and annual reports to Congress were issued relating in detail the activities of the Commission pursuant thereto. (See 69*th Annual Report of the Interstate Commerce Commission,* November 1, 1955, page 93 et seq).

For example, during the five year period 1951-1955, 1972 temporary motor carrier licenses and 26 temporary water carrier licenses, which had been issued for 180 day duration pursuant to Sections 210a and 311 of the Interstate Commerce Act, were extended by the Commission in accordance with Section 9(b) of the Administrative Procedure Act, until the final determination of pending applications by those carriers for permanent authority. Until the *Stone's Express Case, supra,* in 1955, the authority of the Commission so to extend such temporary operating licenses had never been challenged. Pan-Atlantic and the other motor and water carriers involved, relying upon this settled administrative practice of the Commission, initiated operations under such temporary authorities at considerable expense, expecting that their temporary authorities would be extended, if necessary, under Section 9(b) of the Administrative Procedure Act, until their pending applications for permanent authority were finally decided by the Commission. These operations were begun in contemplation of providing uninterrupted service until the time of the final decision.

As of August 31, 1956, there were approximately 383 motor carriers and two water carriers operating under temporary licenses which had been so extended. The decision of the District Court in this case places in grave jeopardy the continued operation of these many carriers. If that decision is followed by the Commis-

sion in this and the many other cases involving the same problem, as indeed the Commission must do unless this Court rules otherwise, an immediate cessation of all services now being performed under such extended temporary licenses would necessarily result. Not only would the public suffer the loss of all those services, established in response to urgent public needs, but the expense of first suspending and then (after final decision) re-instituting them would finally terminate many such carrier services.

The principle of the decision of the three-judge District Court in the *Stone's Express Case, supra,* which threatens to produce this economic chaos in the motor carrier and water carrier industries, and which was followed, although repudiated in substance, by the three-judge District Court in this case, should be fully reviewed by this Court before its devastating effect can be brought to bear upon the many carriers inadvertently exposed to this extreme hazard.

(c) The Questions Presented Require for Their Resolution Plenary Consideration With Briefs on the Merits and Oral Argument

The fundamental problem presented in this case, as previously stated, is one requiring construction and reconciliation of Section 9(b) of the Administrative Procedure Act with Sections 210a and 311(a) of the Interstate Commerce Act.

Although during the first eight years of the Administrative Procedure Act the Interstate Commerce Commission had consistently applied what it believed to be the proper interpretation of those sections in more than two thousand separate instances without challenge, the three-judge District Court in the *Stone's Express Case, supra,* arrived at a different construction

of those sections, thereby completely reversing the long-settled administrative construction.

This Court recognized the significance of the problem presented by the decision of the three-judge District Court in the *Stone's Express Case, supra,* and noted probable jurisdiction (348 U. S. 885, 75 S. Ct. 205, 99 L. Ed. 969). The subsequent dismissal of that case upon stipulation by the parties as to mootness (350 U. S. 906, 76 S. Ct. 190, 100 L. Ed. (adv. p. 125)) has left the question open.

The present case, involving the appellant Pan-Atlantic Steamship Corporation's right to continue its intercoastal steamship operation under its temporary license, while its application for permanent authority is pending, is a direct result of the decision in the *Stone's Express Case, supra.* Unless that issue is resolved by this Court, it is reasonable to anticipate similar litigation in connection with the hundreds of other carriers in a position similar to Pan-Atlantic. Under similar circumstances, where a decision of this Court will guide the disposition of a large number of comparable cases, certiorari has been granted.

Alcoa S. S. Co. v. *U. S.*, 338 U. S. 421, 70 S. Ct. 190, 94 L. Ed. 225
Ludecke v *Watkins*, 335 U S. 169, 68 S. Ct. 1429, 92 L. Ed. 1881

Moreover the issue here presented has only been considered by two three-judge District Courts, and those courts have reached opposite results on the merits of the question.

It is evident that the statutes involved are not clear and unambiguous; otherwise the court in the *Stone's Express Case, supra,* could not have reached a conclu-

sion directly contrary to the substantive conclusion reached by the District Court in this case and to the practice long applied by the agency concerned. The legislative history of the particular statutory provisions involved, and the many aspects of the long-established agency procedure under these statutes, go far toward illuminating and solving the problems here presented. It is both necessary and proper that this Court should have before it, when resolving this problem, a full presentation of all these factors, and such presentation can be accomplished only by full briefing and oral argument on these matters.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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Boston, Massachusetts

Dated September 12, 1956.

APPENDIX A

Opinion of the United States District Court for the District of Massachusetts in *Atlantic Coast Line R. R. Co. et al* v. *United States et al,* Civil Action No. 56-232-W, dated May 17, 1956:

Per Curiam. The amended complaint herein seeks a decree from us setting aside an order of the Interstate Commerce Commission.

On or about May 5, 1955, Pan-Atlantic Steamship Corporation made application to the Commission for permanent authority to operate as a common carrier by water between certain Atlantic and Pacific ports.

While this application was pending, upon application by Pan-Atlantic Steamship Corp., for temporary authority under Sec. 311(a) of the Interstate Commerce Act, as amended (49 U. S. C. Sec. 911(a)), the Commission issued its order on May 18, 1955, granting authority to Pan-Atlantic Steamship Corp., to operate as a common carrier by water between certain named Atlantic and Pacific ports, up to and including November 14, 1955.

Subsequently, by order entered October 28, 1955, the Commission authorized Pan-Atlantic Steamship Corp., to continue to perform such temporary water carrier service, until further order of the Commission, but not beyond the time the pending application for permanent authority should have been determined. This order of October 28, 1955, is the one complainants seek to have us annul, on the ground that it constitutes an *ex parte* extension of temporary authority beyond the maximum period of 180 days prescribed in Sec. 311(a). The Commission, on the other hand, claims that its more extended order is sanctioned by Sec. 9(b) of the Administrative Procedure Act (60 Stat. 242).

This case is ruled in principle by the decision of this court in *Stone's Express, Inc.,* v. *United States,* 122 F.

Supp. 55 (1954). (Our judgment was subsequently vacated for mootness pursuant to stipulation of the parties, *Interstate Commerce Commission* v. *Stone's Express, Inc.*, 350 U. S. 906 (1955).) Though that case involved the 180-day limitation in Sec. 210a(b) of the Interstate Commerce Act (49 U. S. C. Sec. 310a(b)), the issue as to the Commission's power is essentially the same. We think, consistent with the usual deference to precedent common in this Court, we should adhere to the conclusion reached in *Stone's Express, Inc.* v. *United States, supra*.

The plaintiffs' motion for summary judgment is granted, and a permanent injunction will be entered requiring the Commission to set aside and annul its order of October 28, 1955, in so far as that order continues the temporary operation previously authorized by the Commission.

WYZANSKI, *District Judge*. I concur exclusively on the ground that I always defer to an earlier decision by my brethren, except where the decision is remote in time, or except where the court seems to me to have been inescapably wrong. Neither of these conditions is present here. However, in order to make clear the desirability of a Supreme Court review of the problem, I add that were the matter *res integra*, and were I not, as I conceive, bound by the ruling in *Stone's Express, Inc.* v. *United States*, D. Mass., 122 F. Supp. 95 (1954), I should conclude that, by virtue of Sec. 9(b) of the Administrative procedure Act, 60 Stat. 242, the I. C. C. did not act *ultra vires* in entering its order of October 28, 1955. I am authorized to state that Judge Ford agrees with this view.

APPENDIX B

Opinion of the United States District Court for the District of Massachusetts in *Stone's Express Inc.* v. *United States*, 122 F. Supp. 955, 1954:

HARTIGAN, Circuit Judge

This is an action brought against the United States of America and the Interstate Commerce Commission under the provisions of 28 U. S. C. §§ 1336, 2321, through 2325, inclusive, in which the plaintiff seeks to enjoin and vacate an order of the Commission dated January 19, 1954, granting to St. Johnsbury Trucking Co. Inc., temporary approval to lease all the operating rights of Hinsch Transportation Co. Inc. St. Johnsbury and Hinsch intervened as parties defendants under the provisions of 28 U. S. C. § 2323.

On April 12, 1954, the plaintiff, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, 28 U. S. C., made a motion for an order granting it judgment on the pleadings. The material allegations of the complaint admitted by the defendants and the intervenors and the orders of the Commission annexed to the pleadings establish the following facts.

The plaintiff, a Massachusetts corporation, is engaged in interstate commerce as a motor common carrier under a Certificate of Public Convenience and Necessity issued by the Commission. On November 27, 1951, St. Johnsbury, a Vermont corporation, and Hinsch, a New York corporation, both common carriers operating under Certificates of Public Convenience and Necessity issued by the Commission, filed a joint application under Section 5 of the Interstate Commerce Act, 49 U. S. C. A. § 5, for approval of a proposed purchase by St. Johnsbury of Hinsch's certificate. Simultaneously, with the filing of said application, St. Johnsbury and Hinsch sought temporary authority under Section 210a(b) of the Interstate

Commerce Act, 49 U. S. C. A. § 310a(b), to conduct operations for which permanent authority was sought in the Section 5 application. On December 18, 1951, Division 4 of the Commission entered an order which granted the application under Section 210a(b) and authorized St. Johnsbury to lease all the operating rights of Hinsch for a period not exceeding 180 days. On June 3, 1952, Division 4 entered an order extending the temporary authority previously granted by the December 18, 1951, order until "* * * the application filed herein for authority under Section 5 of the Interstate Commerce Act is 'finally determined' as that term is defined * * *" in 49 Code Fed. Regs. §§ 2.1 to 2.3. By an order dated July 2, 1953, Division 4 denied the Section 5 application of St. Johnsbury and Hinsch, but subsequent orders postponed the termination of St. Johnsbury's temporary authority granted by the December 18, 1951 and June 3, 1952 orders until December 15, 1953. On January 19, 1954, the Commission vacated and set aside the July 2, 1953 order of Division 4, and entered an order which approved the Section 5 application and extended the temporary authority previously granted to St. Johnsbury. The plaintiff's petition for reconsideration of this order with respect to the extension of the temporary authority was denied by the Commission on February 23, 1954. By subsequent orders dated April 5, 1954, and April 30, 1954, St. Johnsbury was authorized to purchase the operating rights of Hinsch between July 5, 1954 and August 4, 1954, and effective with the consummation of the authorized transaction or 30 days from July 5, 1954, whichever first occurs, the temporary authority granted by the order entered on December 18, 1951 as amended by the order entered on June 3, 1952 was to be of no further force and effect.

The sole issue presented by the plaintiff's motion for judgment on the pleadings is whether or not the Commission properly granted St. Johnsbury temporary approval to lease all of Hinsch's operating rights for a period

exceeding 180 days. The plaintiff argues that under the provisions of Section 210a(b) of the Interstate Commerce Act, 49 U. S. C. A. § 301a(b), the Commission is prohibited from granting a temporary approval beyond a period of 180 days. The defendants, on the other hand, contend that by the third sentence of Section 9(b) of the Administrative Procedure Act, 5 U. S. C. A. § 1008(b), St. Johnsbury had the right to operate Hinsch's property under its temporary approval until such time as the Commission finally determined the Section 5 application for permanent authority.

The clear and unambiguous language of Section 210a(b) of the Interstate Commerce Act and of Section 9(b) of the Administrative Procedure Act, and their legislative history, compel us to hold that the third sentence of Section 9(b) does not apply to a temporary approval granted by the Commission under Section 210a(b).

The defendants rely solely on the temporary approval granted to St. Johnsbury by the Commission to sustain their contention that St. Johnsbury was a "licensee" within the meaning of the third sentence of Section 9(b) of the Administrative Procedure Act. Under the provisions of Section 210a(b), St. Johnsbury obtained the temporary approval to lease all the operating rights of Hinsch only by virtue of having previously filed a Section 5 application for permanent authority. The third sentence of Section 9(b), however, in using the words "In any case in which the *licensee* has * * * made timely and sufficient application for a renewal or a new license, * * *" indicates that the statute presupposes at the time of the filing of the application the existence of a licensee. (Italics ours). The language of the statute thus clearly reveals that it was designed to prevent a license in existence at the time of the filing of the application for a renewal or a new license from terminating until the agency has finally determined whether or not to grant the renewal

or the new license. But, at the time St. Johnsbury filed its Section 5 application, it did not have a license permitting it to lease Hinsch's operating rights. It obtained its temporary approval to lease all of Hinsch's operating rights only *after* the Section 5 application had been filed. St. Johnsbury is not, therefore, a "licensee" within the meaning of the third sentence of Section 9(b) and does not have the right by virtue of that statute to lease Hinsch's operating rights until the Commission finally determines the Section 5 application.

In addition, the legislative history of the third sentence of Section 9(b) indicates that the statute was only intended to apply to licenses existing at the time of the filing of the application for a renewal or a new license.

The Senate Judiciary Committee Print, June 1945 of the Administrative Act gives the following explanation of Section 9(b):

> "This subsection is designed to ameliorate the difficulties where private parties are required to secure licenses. * * * The third sentence automatically extends a license in any case in which the licensee has made timely application for renewal but the granting agency fails to act prior to the expiration of the existing license. A similar provision is contained in the licensing procedure act of the State of Ohio (Act of June 3, 1943, sec. 1 amending secs. 154-167 (sic) of the General Code; Amended substitute Senate bill No. 36)." Page 35 of Senate Doc. No. 248, 79th Cong. 2d. Sess., entitled "Administrative Procedure Act, Legislative History 79th Congress".

Said Ohio Act referred to the Senate Judiciary Committee Print and found in Vol. 120, p. 361, Laws of Ohio (1943, 1944), states in part:

> "No licensee shall be required to discontinue the operation of a business or profession because of the

failure of an agency to accept or reject said licensee's application for a new license of the same type or class, or renewal of an existing license, or application for registration, prior to the expiration of the license *held by said licensee at the time said application was made* where said application was filed with the agency within the time and in the manner provided by statute or rule of the agency". (Italics ours.)

Also, prior to the passage of the Administrative Procedure Act, there is no doubt that under the facts of the instant case the Commission only had authority to grant a temporary approval for a period not exceeding 180 days by the provisions of Section 210a(b). The defendants, therefore, in arguing that the Commission now has authority to grant a temporary approval exceeding 180 days by virtue of the enactment of the Administrative Procedure Act, in effect contend that the third sentence of Section 9(b) repeals Section 210a(b) by implication. The Supreme Court, however, has frequently stated that a statute will not be held to repeal a prior statute by implication unless no other reasonable construction is possible. *Posadas* v. *National City Bank*, 1936, 296 U.S. 497, 56 S.Ct. 349, 80 L.Ed. 351; *United States* v. *Jackson*, 1938, 302 U.S. 628, 58 S.Ct. 390, 82 L.Ed. 488; *United States* v. *Borden Co.*, 1939, 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181. The intention of the legislature to repeal "* * * must be clear and manifest." *Red Rock* v. *Henry*, 1882, 106 U.S. 596, 602, 1 S.Ct. 434, 439, 27 L.Ed. 251. There must be a "positive repugnancy between the provisions of the new laws and those of the old". *Wood* v. *United States*, 1842, 16 Pet. 342, 363, 10 L.Ed. 987. We find no such repugnancy between the provisions of §§ 210a(b) and 9(b). Section 210a(b) in clear and unambiguous terms states that the Commission may grant temporary approval for a period *not exceeding 180 days*. In holding that the third sentence of §§ 9(b) does not apply to the temporary ap-

proval granted to St. Johnsbury, we are, therefore, following the well established rule of giving effect to both statutes covering the same general subject matter. *United States* v. *Borden Co., supra.*

A final contention of the defendants is that the Commission pursuant to Section 12 of the Administrative Procedure Act, 5 U. S. C. A. § 1011, published its interpretation of the third sentence of Section 9(b) in which it construed that sentence as being applicable to temporary approvals granted under Section 210a(b). The contemporaneous and continued construction of the Commission is entitled to great weight. *United States* v. *Alabama Railroad Co.*, 1892, 142 U.S. 615, 12 S.Ct. 306, 35 L.Ed. 1134; *U.S.* v. *America Trucking Assn's,* 1940, 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345. But, because the provisions of §§ 210a(b) and 9(b) are unambiguous and their directions specific, "* * * there is no power to amend it by regulations." *Koshland* v. *Helvering,* 1936, 298 U.S. 441, 447, 56 S.Ct. 767, 770, 80 L.Ed. 1268; See *Alaska Steamship Co.* v. *U.S.,* 1933, 290 U.S. 256, 54 S.Ct. 159, 78 L.Ed. 532; *Social Security Board* v. *Nierotko,* 1946, 327 U.S. 358, 66 S.Ct. 637, 90 L.Ed. 718. "* * * Inconvenience or hardships, if any, that result from following the statute as written, must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority * * *" with respect to the granting of temporary approvals under section 210a(b), *United States* v. *Mo. Pac. R. Co.,* 1929, 278 U.S. 269, 277, 278, 49 S.Ct. 133, 136, 73 L.Ed. 322.

The plaintiff's motion for judgment on the pleadings is granted and a permanent injunction will be entered requiring the Commission to set aside and annul its order of January 19, 1954, insofar as that order continues the temporary operations authorized by the Commission.

APPENDIX C

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C. on the 28th day of October, A.D. 1955

No. *W-376* (*Sub-No. 11*)

Pan-Atlantic Steamship Corporation

Temporary Authority—Intercoastal Trade

No. W-376 (Sub-No. 12)

Pan-Atlantic Steamship Corporation

Temporary Authority—Intercoastal Trade (2)

It appearing, That by order of May 18, 1955, the Commission, Division 4, granted Pan-Atlantic Steamship Corporation, temporary authority to operate as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation (1) of passenger and commodities generally (a) from Philadelphia, Pa., Baltimore, Md., Charleston, S. C., Jacksonville and Miami, Fla., to Seattle, Wash., Portland, Oreg., San Francisco, Oakland Alameda and Los Angeles Harbor, Calif., (b) from San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor to Boston, Mass., New York Harbor, N. Y., Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (c) from Seattle and Portland to Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (2) of passengers between New Orleans, La., and Houston, Tex., on the one hand, and, on the other, Seattle, Portland, San Francisco, Oakland, Alameda Stockton and Los Angeles Harbor.

It further appearing That there is a public need for continuance of the said water carrier service, that it is an activity of a continuing nature, and that this service corresponds in part with that which the carrier by application No. W-376 (Sub. No. 13) seeks a certificate of

public convenience and necessity; and good cause appearing therefor:

It is ordered, That said carrier be, and it is hereby authorized to continue to perform said water carrier service until further order of the Commission, but not beyond the time said application No. W-376 (Sub. No. 13) has been finally determined.

By the Commission, Division 4.

HAROLD D. McCOY
Secretary

(SEAL)

APPENDIX D

Judgment of the United States District Court for the District of Massachusetts in *Atlantic Coast Line R.R. Co. et al.* v. *United States, et al.*, Civil Action No. 56-232-W, entered May 25, 1956:

JUDGMENT

This cause came on to be heard on the plaintiff's motion for leave to amend their complaint and on the motion of the plaintiffs and of Pan-Atlantic Steamship Corporation, intervening defendant, for summary judgment pursuant to Rule 56 of the Federal Rules of the Civil Procedure, and the Court having considered the verified first amended complaint and the answers thereto filed by Pan-Atlantic Steamship Corporation and the Interstate Commerce Commission, intervening defendants, and the answer of the United States filed responsively to the complaint, having found that there is no genuine issue as to any material fact and no controversial question of fact to be submitted to the Trial Court; and having concluded that plaintiffs are entitled to judgment as a matter of law,

It is hereby ORDERED, ADJUDGED AND DECREED:

(1) That the plaintiffs motion for leave to file their first amended complaint is granted;

(2) That the plaintiff's motion for summary judgment is granted and Pan-Atlantic Steamship Corporation's motion for summary judgment is denied.

(3) That the order of the Interstate Commerce Commission dated October 28, 1955, entered in I.C.C. Docket No. W-376 (Sub-Nos. 11 and 12) extending Pan-Atlantic Steamship Corporation's authority to engage in intercoastal operations beyond a period of 180 days shall be, and it is hereby vacated, annuled and set aside.

Certificate of Service

In compliance with Rules 13(2) and 33(1), (2) and (3-b) of the Revised Rules of the Supreme Court of the United States, I, Russell S. Bernhard, one of the attorneys for the appellant Pan-Atlantic Steamship Corporation, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing document on counsel for the several parties to this proceeding, as indicated below.

This, the 12th day of September, 1956.

RUSSELL S. BERNHARD.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 408

PAN-ATLANTIC STEAMSHIP CORPORATION, *Appellant*

v.

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, SOUTHERN RAILWAY SYSTEM, and THE NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY, *Appellees*

Appeal from the United States District Court for the District of Massachusetts

BRIEF OF PAN-ATLANTIC STEAMSHIP CORPORATION, APPELLANT

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IN THE

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OCTOBER TERM, 1956

No. 408

PAN-ATLANTIC STEAMSHIP CORPORATION, *Appellant*

v.

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, SOUTHERN RAILWAY SYSTEM, and THE NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY, *Appellees*

Appeal from the United States District Court for the District of Massachusetts

---

BRIEF OF PAN-ATLANTIC STEAMSHIP CORPORATION, APPELLANT

OPINION BELOW

The opinion of the three-judge United States District Court for the District of Massachusetts in the case under appeal has not been reported but a copy of that opinion is annexed hereto as Appendix A. That opinion gives no reason for the District Court's decision other than the statement that this case is con-

trolled by the decision of the United States District Court for the District of Massachusetts in *Stone's Express, Inc.* v. *United States*, 122 F. Supp. 955 (1954), the opinion in which case is annexed hereto as Appendix B. The order of the Interstate Commerce Commission, which was the subject matter of the suit in the lower Court, is annexed hereto as Appendix C.

JURISDICTION

The final judgment of the District Court was entered on May 25, 1956. (Tr. 32). Notice of Appeal to this Court was filed on July 25, 1956. (Tr. 39). Probable jurisdiction was noted by this Court on November 19, 1956. (Tr. 43). Jurisdiction to review the judgment on direct appeal is conferred upon this Court by sections 1253 and 2101 (b) of the Judicial Code, 28 U.S.C. 1253 and 2101(b).

STATUTES AND REGULATIONS INVOLVED

The principal statutory provisions involved are the following:

> Section 9(b) — Administrative Procedure Act (5 U.S.C. 1008(b)). (This controversy concerns the third sentence, italicized herein for emphasis):
>
> (b) *Licenses*—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless,

prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. *In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.*

Section 311(a)—Interstate Commerce Act (49 U.S.C. 911(a)):

To enable the provision of a service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such a need, the Commission may, in its discretion and without hearings, or other proceedings, grant temporary authority for such service by a common carrier by water or a contract carrier by water, as the case may be. Such temporary authority shall be valid for such time as the Commission shall specify but not for more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

Other statutory and regulatory provisions involved are sections 210a(a), 210a(b), and 311(b) of the Interstate Commerce Act (49 U.S.C. 310a(a), 310a(b) and 911(b)); section 12 of the Administrative Procedure Act (5 U.S.C. 1011); sections 102, 103 and 1501 of the Second War Powers Act of 1942 (56 Stat. 177); section 1501 of Amendment to Second War Powers Act (60 Stat. 345); and sections 2.1-2.4 of the

Regulations of the Interstate Commerce Commission (49 C.F.R. Part 2, Sect. 2.1 to 2.4). These statutory and regulatory provisions appear in Appendix D hereto.

QUESTIONS PRESENTED

The following questions are presented by this Appeal:

First Question: Whether Section 9(b) of the Administrative Procedure Act (5 U.S.C. 1008(b)) extended, or authorized or required the Commission to extend, beyond 180 days a temporary authority issued to Pan Atlantic Steamship Corporation under Section 311(a) of the Interstate Commerce Act (49 U.S.C. 911(a)) (Tr. 14) authorizing operation as a common carrier by water, where the common carrier operation was of a continuing nature and Pan-Atlantic had filed a timely and sufficient application for a certificate of public convenience and necessity to continue the same operations conducted under the temporary authority, which application had not been finally determined by the Commission upon expiration of the 180 days of operation allowed by the temporary authority?

Second Question: Whether the District Court was in error in this case by following its decision in *Stone's Express, Inc.* v. *United States,* 122 F. Supp. 955, under the doctrine of *stare decisis,* in view of the fact that the Supreme Court of the United States noted probable jurisdiction in the appeal of that case, *Interstate Commerce Commission* v. *Stone's Express, Inc.*, 348 U.S. 855, 75 S. Ct. 205, 99 L. Ed. 696, and subsequently vacated said judgment and remanded the case to the District Court for dismissal of the pro-

ceedings in accordance with the stipulation of the parties as to mootness, 350 U.S. 906, 76 S. Ct. 190, 100 L. Ed. (adv. p. 125), and when two of the three judges in this case stated in their concurring opinion that were the matter *res integra,* they would have entered judgment for the defendant in this case?

STATEMENT OF THE CASE

The appellant, Pan-Atlantic Steamship Corporation, herein called Pan-Atlantic, is a Delaware Corporation operating as a common carrier by water of freight and passengers in interstate commerce between ports on the Atlantic and Gulf coasts of the United States, pursuant to a permanent certificate of public convenience and necessity issued by the Interstate Commerce Commission, herein called the Commission, and between ports on the Atlantic and Pacific Coasts of the United States, via the Panama Canal, pursuant to a temporary operating authority issued by the Commission. (Tr. 14). It is this temporary authority which is the subject matter of this case.

The appellees are corporations operating as common carriers by rail of freight and passengers in interstate commerce in the area of the United States east of the Mississippi River, and a segment of their operation involves the movement of transcontinental traffic through connections with western railroads. (Tr. 3).

On May 6, 1955, Pan-Atlantic filed an application with the Commission under section 309 of the Interstate Commerce Act (49 U.S.C. 909) for a permanent certificate of public convenience and necessity to transport freight and passengers as a common carrier

by water between certain ports on the east and west coasts of the United States via the Panama Canal. On that same date, in response to an urgent and immediate public need for such water carrier transportation, Pan-Atlantic filed a second application with the Commission, under the provisions of Section 311(a) of the Interstate Commerce Act, for immediate temporary authority to provide a substantial portion of the service proposed in its application for a permanent certificate. The Commission granted the application for temporary authority by its order dated May 18, 1955, and provided that such temporary authority would expire 180 days later on November 14, 1955. (Tr. 9).

On or about September 30, 1955, recognizing that the proceeding on the application for the permanent certificate would not be concluded prior to November 14, 1955, and to avoid cessation of the inter-coastal water carrier service which had been established pursuant to the temporary authority, Pan-Atlantic made a timely written request to the Commission, in accordance with applicable rules which had been published by the Commission (Appendix D) to implement the third sentence of section 9(b) of the Administrative Procedure Act, for findings permitting a continuation of its temporary authority until its application for permanent authority had been finally determined. (Tr. 11).

In response to the written request of Pan-Atlantic for findings permitting the extension of its temporary authority, the Commission issued an order dated October 28, 1955 (Appendix C) (Tr. 14) containing the following findings of fact: that the public need required the continuance of the service which Pan-

Atlantic had been providing under its temporary authority, that said activity of Pan-Atlantic was of a continuing nature, and that such service was contained within the scope of the application of Pan-Atlantic for a permanent certificate.

Based upon these findings, the Commission concluded that Pan-Atlantic was authorized, under the third sentence of section 9(b) of the Administrative Procedure Act, to continue the operations authorized by the temporary authority until the pending application for permanent authority had been finally determined.

A petition for reconsideration of the Commission's order of October 28, 1955, filed by the railroad appellees (Tr. 15), was denied by Commission January 9, 1956. (Tr. 18). The appellees filed an amended complaint on April 30, 1956, in the United States District Court to vacate, annul, and set aside the Commission's order of October 28, 1955. (Tr. 3).

The District Court held that this case was ruled in principle by the prior decision of that Court in *Stone's Express Inc.* v. *United States*, 122 F. Supp. 955 (1954) (Appendix B), and "that with the usual deference to precedent common in this Court", it should adhere to the conclusion reached in that case. In a concurring statement, two of the three judges constituting the three-judge court stated that if they were not, as they conceived it, bound by a prior ruling in the *Stone's Express Case*, they would conclude that "by virtue of section 9(b) of the Administrative Procedure Act, 60 Stat. 242, the Interstate Commerce Commission did not act *ultra vires* in entering its order of October 28, 1955." One of the three judges

concurring in this statement had participated in and approved the conclusion in the *Stone's Express Case*, which indicates a reversal of his opinion.

In the *Stone's Express Case*, supra, the District Court held that section 9(b) of the Administrative Procedure Act did not confer authority on the Commission to extend temporary licenses issued under section 210a(b) of the Interstate Commerce Act (49 U.S.C. 310a(b)) (Appendix D) beyond the 180 day limit specified in that section. An appeal from that decision was taken to this Court, which noted probable jurisdiction. (*Interstate Commerce Commission* v. *Stone's Express, Inc.*, 348 U.S. 885, 99 L. ed. 696, 75 S. Ct. 205). However, as a result of a final decision by the Commission of the pending permanent authority application of Stone's Express permitting it to acquire permanently the operation which it had been temporarily conducting, prior to a decision by this Court, the temporary authority expired, and the issues became moot. Upon the filing of a stipulation of the facts by the parties, the case was remanded to the District Court for dismissal as moot (350 U.S. 906, 100 L. ed. 125, 76 S. Ct. 190).

Apart from the *Stone's Express Case*, the issue presented by this appeal has never been decided by this Court or by any other court. The decision on this appeal will determine not only the legality of the Pan-Atlantic inter-coastal operation but also the legality of several hundred other motor carrier and water carrier operations being conducted under temporary licenses issued by the Commission for initial periods of 180 days and extended by it pursuant to findings made under section 9(b) of the Administrative Procedure Act during the pendency

of the applications of these carriers for permanent certificates.

SUMMARY OF ARGUMENT

FIRST QUESTION: The third sentence of section 9(b) of the Administrative Procedure Act prevents the expiration of a license of limited duration issued for an activity of a continuing nature, if the licensee has made a timely application for a new license to continue such activity, for such period as may be necessary to permit the licensing agency to complete its action on such application. The purpose of this legislation was to protect persons required to operate pursuant to licenses against a compulsory cessation of activities (and the irreparable injuries that would flow therefrom) resulting from the failure of the licensing agency to complete the processing of the timely-filed application for a new license before the existing license expired.

The temporary authority of Pan-Atlantic, issued under section 311(a) of the Interstate Commerce Act, is a license of limited duration applicable to an activity of a continuing nature, and, by its terms, it would have expired during the pendency of a proceeding before the Commission on the timely-filed application for a permanent certificate of public convenience and necessity covering such activity. The facts of this case therefore place it within the literal terms of section 9(b). Had the temporary authority of Pan-Atlantic not been extended by section 9(b), Pan-Atlantic would have been forced to suspend its inter-coastal operations during the remainder of the proceedings on its pending application for permanent authority to conduct such operations, at substantial

and irreparable injury to itself and despite the Commission's findings of a continuing public need for such service.

Section 311(a) of the Interstate Commerce Act is not in conflict with the third sentence of section 9(b) of the Administrative Procedure Act. Section 311(a) is a delegation of licensing authority to the Commission and authorizes issuance of temporary licenses subject to a time limit of 180 days. The third sentence of 9(b) need not be construed as a delegation of additional licensing authority to the Commission. Section 9(b) provides for the automatic extension of an existing license beyond its expiration date as a matter of law, provided certain jurisdictional facts exist. It is remedial legislation. The function of the Commission is to implement the operation of section 9(b) by determining whether such jurisdictional facts are present in a particular case, and if they are present, the Commission has no discretionary authority as to whether the license should be extended.

Even if section 9(b) of the Administrative Procedure Act is regarded as an extension of the licensing power of the Commission, and, therefore, must be reconciled with the period limitation in section 311(a) of the Interstate Commerce Act, the established canons of statutory construction, the legislative history of the statutes involved, and the long continued practice of the Commission with the knowledge and consent of Congress require that the third sentence of section 9(b) be construed as applicable to temporary licenses issued under section 311(a).

SECOND QUESTION: The District Court erred in applying the rule of *stare decisis* and entering judg-

ment for plaintiffs, rather than following their conclusion on the merits and entering judgment for the defendants. The rule of *stare decisis* has, as its object, the establishment of precision and certainty in the law; and it operates, in effect, as an estoppel applied to Court decisions. When the rights of individuals have been settled, on the basis of an announced judicial principle or statutory interpretation, public policy requires continued adherence to such judicial pronouncement. The ruling in *Stone's Express, Inc.* v. *United States, supra*, which was applied in this case under the doctrine of *stare decisis*, never adjudicated any rights between parties. That case was dismissed as moot, and the Interstate Commerce Commission neither before nor after that case has accepted or applied the interpretation announced therein. Thus, the *Stone's Express Case* established no precedent to which the doctrine of *stare decisis* would be applicable. In deciding this case, the District Court should have treated the question presented as a matter *res integra* and entered judgment for the defendants in accordance with their conclusions on the merits; as stated in the concurring opinion.

ARGUMENT

I. THE CHALLENGED ORDER OF THE INTERSTATE COMMERCE COMMISSION AND THE EXTENSION OF THE TEMPORARY AUTHORITY OF APPELLANT ARE AUTHORIZED BY SECTION 9(b) OF THE ADMINISTRATIVE PROCEDURE ACT.

The order under attack in the suit below was the order of the Interstate Commerce Commission, dated October 28, 1955, which, responsive to a written request by Pan-Atlantic, found that Pan-Atlantic had met the jurisdictional requirements of the quoted terms of section 9(b). As the result of such finding

Pan-Atlantic was authorized to continue intercoastal water carrier operations under a 180 day temporary authority, previously granted under section 311(a) of the Interstate Commerce Act, until such time as the Commission could complete its action upon a pending application of Pan-Atlantic for a certificate of public convenience and necessity authorizing it permanently to conduct the operation. The Commission's action and the continued operation rest upon the authority provided in the third sentence of section 9(b) of the Administrative Procedure Act, quoted above.

A. The Action Taken Was in Conformity With the Express Provisions of Section 9(b)

The language of the third sentence of section 9(b) provides:

> "In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency".

This provision acts to extend the class of license therein defined if three conditions are met. These are: first, that there be a "licensee"; second, that the license authorize an "activity of a continuing nature"; and third, that the licensee has "in accordance with agency rules, made a timely and sufficient application for a renewal or new license" applicable to that activity. Those conditions were fulfilled in this case.

The Commission in its order of October 28, 1955 (Appendix C) made the necessary jurisdictional

findings for application of section 9(b) to the Pan-Atlantic temporary license, as follows:

> "That there is a public need for continuance of the said water carrier service, that it is an activity of a continuing nature, and that this service corresponds in part with that which the carrier by application No. W-376 (Sub. No. 43) seeks a certificate of public convenience and necessity . . ."

1. Pan-Atlantic was a licensee

Pan-Atlantic was a licensee, since it was the holder of a temporary authority issued by the Commission on May 18, 1955, authorizing it to engage in the business of common carrier by water between Atlantic and Pacific Coast ports for a period of 180 days. Such an authority is a "license" within the meaning of the Administrative Procedure Act. Section 2(e) of that Act (5 U.S.C. 1001(e)) defines the word as follows:

> "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.

The third sentence of section 9(b) deals with licenses issued for a specified term, as distinguished from those of indefinite duration, since its subject matter is licenses requiring renewal or replacement. The legislative history of section 9(b) shows that the third sentence of the section was to have application to temporary licenses of the type presented in this proceeding. The Senate Committee on the Judiciary and the House Committee on the Judiciary, in their reports on S.7 (Administrative Procedure Act), in commenting on section 9(b) drew a distinction between

the application of the second and third sentences of the section; the distinction made establishes that the third sentence was to have application to temporary licenses. In commenting on the second sentence, which establishes conditions for agency revocation of licenses, they said:

> "However, this limitation does not apply to temporary permits or temporary licenses." (Sen. Doc. No. 248, 79th Congress, 2d Session, pages 212 and 275).

The report of the Attorney General to the Senate Judiciary Committee, in response to its request for his comments on S.7, similarly states in regard to section 9(b):

> "The second sentence of subsection (b) is not intended to apply to temporary licenses which may be issued pending the determination of applications for licenses." (Op. cit., page 229).

While it is clear that the third sentence of section 9(b) relates to temporary licenses of the type here involved, an issue is presented whether Pan-Atlantic was a "licensee" within the meaning of this part of the statute at such time as to make it applicable.

2. Pan-Atlantic was a licensee at the time necessary to make Section 9(b) applicable

Pan-Atlantic filed its temporary authority application and its corresponding application for permanent authority simultaneously, on or about May 8, 1955. The temporary authority was granted on May 18, 1955. The permanent authority application, therefore, was on file prior to the creation of the temporary license on May 18, 1955. The procedure was "in accordance

with agency rules." Section 2.2(a) of the Commission's rules (49 C.F.R. 2.2(a); see Appendix D) provides merely that the application for permanent authority must have been filed not later than 60 days after the grant of the temporary authority.

In the *Stone's Express Case*, it was held, in similar circumstances, that section 9(b) was inapplicable, among other reasons, because, as here, the carrier concerned was not a temporary licensee at the time that the application for permanent authority was *filed*, thus suggesting that the third sentence of section 9(b) is applicable, if at all, only when the creation of the temporary license precedes the filing of the application for "a renewal or a new license."

Appellants urge this Court to reject the interpretation of the Court in the *Stone's Express Case* (which the lower Court in this case applied) as one not required by consideration of the literal meaning of the words employed in the statute, as one which would controvert rather than assist in accomplishing the legislative objective to which the provision relates, as one which would create artificial and unreasonable distinctions in the application of the provision to persons similarly situated, and as one inconsistent with settled administrative construction and the legislative history of the provision.

The pertinent language in the third sentence of section 9(b) provides for renewal of or issuance of new licenses "in any case in which the licensee has . . . made timely and sufficient application . . . ." The District Court's interpretation would require a reading incorporating a parenthetical addition, in effect as follows: "in any case in which the licensee has (at the

time he was a licensee) . . . made timely and sufficient application . . . ." The third sentence of section 9(b), however, speaks as of the time of expiration of the temporary license, not as of the time when it was created. Although it establishes some conditions governing its application, it does not expressly establish a condition making it necessary for the temporary license to have preceded the request for a permanent one. The controlling criterion is that the activity must be one of a continuing nature. The activity may be of a continuing nature whether or not the temporary authority was established first. The construction adopted by the District Court creates a repugnance of meaning within the terms of the provision as well as controverting its purpose.

The purpose of the third sentence of section 9(b) is to protect licensees against injury from dilatory agency action, by providing for automatic extension of a license in any case involving a continuing activity in which the person engaged in the activity has made a timely request for renewal and the issuing agency, because of inadequate time, fails to act prior to the expiration of the existing license. (See Part II B below). The District Court's interpretation, in light of this purpose, contradicts that objective. By filing its permanent authority application concurrently with its temporary authority application, Pan-Atlantic here enabled the Commission to employ the full term of the 180 day temporary license, together with the time (10 days) which elapsed between the time of their filing and the date of the grant of the temporary license, to complete its action on the permanent authority application. Had it followed the procedure suggested by the opinion of the District Court in the

Stone's Express Case, and withheld filing its permanent authority application until after the grant of the temporary license, the effect would have been to have shortened the time during which the agency might act on the permanent authority application. Carrying this example to the extreme limits implicit in the lower court's interpretation, a temporary licensee might wait indefinitely (within the limits of agency rules) following its acquisition of a temporary license before filing for a renewal or new license, thus depriving the agency of adequate opportunity to rule on such application before the expiration of the temporary license. Such a result is clearly contrary to the result sought to be accomplished through this provision.

Since the third sentence of section 9(b) acts upon the situation as it exists at the time when the temporary license would expire, one who "has . . . made" an application for renewal or a new license is one who has made such an application prior to the date upon which his temporary license would otherwise expire. Such an interpretation is in accord with the literal meaning of the words employed and with the purpose which this remedial legislation sought to accomplish.

The interpretation of the District Court, moreover, would create an artificial and unreasonable distinction between persons in identical positions insofar as the purpose of section 9(b) is concerned. The evil that section 9(b) is intended to cure is the non-compensable injury that would follow a forced suspension of operations by a temporary licensee on the expiration date of its temporary license and while its application for permanent authority is pending.

That evil arises without regard to whether the application for permanent authority was filed before or after the temporary license was issued; but under the doctrine of the *Stone's Express Case*, a licensee who filed his application for permanent authority after receiving his temporary license would be protected by section 9(b), but the licensee who filed his application for permanent authority before receiving his temporary license would not be so protected, notwithstanding the fact that upon the expiration date of the two temporary licenses, both licensees would be in identical positions.

The Interstate Commerce Commission has long applied the construction, here advanced by appellant, that the third sentence of section 9(b) applies to temporary licensees who have permanent applications pending at the time of the *expiration* rather than at the time of the *inception* of their temporary licenses. Its "agency rules" (Appendix D) made under section 9(b) do not establish the distinction which the lower court's interpretation would create. It has extended many hundreds of temporary authorities under circumstances similar to those in the *Stone's Express Case*. Its agency rules in situations arising under section 210a(b), which authorize the grant of temporary authority to operate or control a motor carrier operation pending disposition of an application for permanent acquisition filed pursuant to section 5(2) of the Act, *requires simultaneous filing* of the application under section 5(2) with that filed under section 210a(b).*

* I.C.C. Form B.M.C. 46 (revised), applicable to applications for approval of temporary authority to control a motor carrier under section 210a(b) of the Act, contains the following printed

The legislative history of the provision in question does not support the interpretation adopted by the lower court. The comment of the Attorney General, supra, ". . . temporary licenses which may be issued pending the determination of applications for licenses", indicates his understanding that temporary licenses might be issued *after* the filing of the permanent authority application, within the purview of the third sentence of section 9(b). Although a similar provision, which specifically requires the antecedent grant of a temporary license, is present in the licensing procedure act of the State of Ohio (see text in *Stone's Express Case* decision, Appendix B herein), and was considered by Congress in drafting section 9(b) (a fact relied upon by the lower court), Congress did not adopt the language of that act, but formulated its own expression in the light of the purpose and circumstances reviewed above and omitted that specific condition.

For the foregoing reasons we submit that the word "licensee" as used in section 9(b) should be construed as of the date of the expiration of the temporary license, when section 9(b) becomes applicable; and, as heretofore demonstrated, Pan-Atlantic was a licensee under such interpretation.

3. Pan-Atlantic's temporary license authorized an activity of a continuing nature

Although the license granted to Pan-Atlantic by the Commission on May 18, 1955, pursuant to section 311(a) was of limited duration, namely 180 days, the

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instruction: "No consideration can be accorded an application for temporary authority under section 210a(b) unless a corresponding application under section 5 has been filed." See also section 180.6 of the I.C.C. Motor Carrier Regulations (49 C.F.R. 180.6).

activity which it authorized was of a continuing nature. The license was granted in response to representations by the public of a need for a continuing inter-coastal water-carrier service in the transportation of freight and passengers. The fact that Pan-Atlantic had filed its permanent authority application simultaneously with the temporary authority application evidenced its intention to provide a continuing service. That service, initiated shortly after the grant of the temporary license, has been continuous. The Commission, in the challenged order, found the activity to be of a continuing nature. The finding was not challenged in the proceeding below.

4. Pan-Atlantic made timely and sufficient application for renewal of its license

Pan-Atlantic's request for renewal of its temporary authority pursuant to the third sentence of section 9(b) was filed in accordance with the rules which the Commission has provided to govern such proceedings. (49 C.F.R. 2.1-2.4, Appendix D, herein). The Commission found in its challenged order that this request was timely and sufficient. The finding was not challenged in the proceeding below.

II. THE EXTENSION OF PAN-ATLANTIC'S TEMPORARY AUTHORITY PURSUANT TO SECTION 9(b) OF THE ADMINISTRATIVE PROCEDURE ACT IS NOT PROHIBITED BY THE TERMS OF SECTION 311(a) OF THE INTERSTATE COMMERCE ACT.

The temporary license granted Pan-Atlantic on May 18, 1955 was issued by the Commission pursuant to authority granted it in section 311(a) of the Interstate Commerce Act (49 U.S.C. 911), which provides that the Commission may grant temporary authorities "for which there is an urgent need", and an absence

of "carrier service capable of meeting such need". The statutory authority is conditioned as follows:

> "Such temporary authority shall be valid for such time as the Commission shall specify but not for more than an aggregate of one hundred and eighty days, . . . "

Accordingly, the temporary authority granted to Pan-Atlantic was conditioned to expire at the end of a period of 180 days from its date of issue.

Prior to the expiration of that temporary authority, as shown above, actions were completed by Pan-Atlantic and the Commission which established that the situation was one within the meaning of the third sentence of section 9(b), thereby invoking the automatic extension of that temporary authority pending determination of the permanent authority application. The challenged Commission order gave evidence of that fact. Thus, there is created an apparent inconsistency between the express period limitation in section 311(a) and the automatic extension provision of section 9(b). That conflict, however, is more apparent than real, as shown by consideration of the seemingly conflicting positions of those sections in light of the language employed and the intention expressed by Congress.

A. The Legislative Histories of Sections 311(a) and 9(b) Establish a Basis for Harmonious Construction

Section 311(a) applicable to water carriers, was enacted in 1940, and is similar to section 210a(a), (49 U.S.C. 310a(a)), applicable to motor carriers. The House Committee on Interstate and Foreign Commerce in its Report 1217, 76th Congress, 1st Session, described section 311 (49 U.S.C. 903) as follows:

"This section permits the Commission to authorize temporary operations by water carriers to meet immediate and urgent needs, and in cases where delays occur in connection with the determination of applications for consolidations and mergers. It is comparable to section 210a of Part II."

Section 210a(a) did not appear in the Motor Carrier Act of 1935, now Part II of the Act. The Commission soon recognized the need for authority to issue temporary licenses and brought this matter to the attention of Congress in 1938 in a letter appearing in Senate Document 154, 75th Congress, 3rd Session, which stated in part:

"As the Act now stands, it is necessary, before new operations of a motor carrier can be undertaken, to obtain from the Commission a certificate of public convenience and necessity, if the proposed operations are those of a common carrier, or a permit, if they are those of a contract carrier. The Act provides, also, that before we grant such a certificate to a common carrier, proof that the contemplated operations are required by the present or future public convenience and necessity must be presented, and somewhat similar proof must be presented before we can grant such a permit to a contract carrier.

"Some considerable time is necessarily required for the procedure entailed by a public hearing and decision of the issues here presented. The Act now contains no provision enabling us speedily to grant temporary operating authority to meet an emergency, pending such formal determination of the matter. We believe that we should have power to make such temporary grants".

Section 210a(a) was added as a result of this request in 1938.

A three-judge United States District Court in *Kansas City and Leavenworth Transp. Co. v. United States*, 51 F. Supp. 916, in construing the intent of section 210a(a), made the following pertinent comments, at page 920, which apply with equal validity to section 311(a):

> "Second, we think that section 210a(a) must be considered in the light of section 207(a). Under the latter section applications for certificates of authority are based on "present" and "future" public convenience and necessity. There is no requirement of proof of permanent public convenience and necessity. Considering the two sections and what each was designed to accomplish, we think Congress, in its experience, saw that public convenience and necessity, would, at times, become so urgent as to require transportation facilities without waiting for hearing and decision under section 207(a). Accordingly, it enacted section 210(a) which provides for the issuance of a certificate for immediate need. *Such immediate necessity is designed to cover that period which may elapse before the Commission issues a certificate under section 207(a).*"

In 1938, when section 210a(a) was enacted, and even as late as 1940, when section 311(a) became law, it was believed that 180 days was an adequate period of time within which to permit the Commission to complete action upon the permanent authority applications corresponding to the temporary authorities issued pursuant to those sections. Such has not proved to be the case, many such applications actually requiring 12 months or more to complete. The advent

of the war period tremendously increased the administrative burden, as applications were filed to meet rapidly changing conditions, necessitating relief from the 180 day limitation in these sections. Such relief was obtained initially as a temporary measure by section 103 of the Second War Powers Act of 1942 (56 Stat. 177) (Appendix D), which amended section 311(a) of the Interstate Commerce Act in the following words:

> "Section 103. Subsection (a) of section 311 of said Act, as amended, (U.S.C. 1940 Ed., Title 49, section 911(a)), is hereby amended by striking out the words 'but not for more than an aggregate of one hundred and eighty days.'"

The amendment also provided, in section 1501, for the reinsertion of the 180-day limitation upon expiration of the Second War Powers Act. Similar treatment was accorded section 210a(a).

Even though the 180-day limitation provision later was reinserted in sections 210a(a) and 311(a), it did not become applicable to temporary authorities issued for continuing activities, under the circumstances presented in this case. Prior to the expiration of the Second War Powers Act, Congress had undertaken the task of renovating the administrative processes of the Government, which resulted in the enactment of the Administrative Procedure Act, effective September 11, 1946. As enacted, it contained section 9(b) which, as shown, provided for the automatic extension of temporary authorities governing activities of a continuing nature to protect the holders thereof from forced cessation of operations resulting from agency delays in deciding applications for renewals or new licenses.

When section 9(b) became law, the 180-day limitations in sections 311(a) and 210a(a) were still absent. (The words had been physically deleted from authorized prints of the statute.) As a consequence, the provisions of section 9(b), for automatic extension of temporary licenses for activities of a continuing nature, became effective before the present 180-day limitation was restored to sections 311(a) and 210a(a). That limitation was reinserted in those sections on March 31, 1947, the date of expiration of the Second War Powers Act of 1942. That reinsertion occurred, not by Congressional action taken at that time, but as the result of section 1501 of that Act, which provided that all legislative changes made by that Act would automatically be terminated, and the status quo ante restored, upon expiration of that Act.*

B. Section 9(b) Extends Temporary Licenses by Operation of Law Rather Than Through Granting Additional Licensing Authority to Administrative Agencies; There Is No Actual Contradiction in Terms Between Sections 9(b) and 311(a)

The Administrative Procedure Act was adopted as remedial legislation to accomplish reforms in the administrative processes of Government. The third sentence of section 9(b) had a specific purpose within the scope of the broad objectives of that legislation. The House Judiciary Committee, in reporting out this bill, stated: "The bill is an outline of minimum essential rights and procedures", and this Court, in

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* Section 1501 of the Second War Powers Act of 1942 originally provided for restoration of legislation to the original form (including re-insertion of the 180-day limitation, although not specifically mentioned) at its expiration date of December 31, 1944. This date was successively extended to December 31, 1945, June 30, 1946, and March 31, 1947.

Wong Yang Sung v. *McGrath*, 339 U.S. 33, 94 L. Ed. 616, at 624, stated:

> "The Act thus represents a long period of study and strife; it settled long-continued and hard fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities, and, no doubt, some ambiguities. Experience may reveal defects. But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils aimed at appear."

Congressman Walter, the member of the House Committee on the Judiciary who had charge of the bill on the floor of the House, in explaining the several provisions to the House, stated as follows with respect to section 9(b):

> "Section 9(b) deals with licensing. It requires agencies to determine promptly all applications for licenses, prohibits them from withdrawing a license without first giving the licensee notice and an opportunity to achieve compliance except in cases of obvious willfulness or emergency, and in businesses of a continuing nature precludes any license from expiring until timely applications for new licenses or renewals have been determined.
>
> "These special provisions are necessary because of the very severe consequences of the conferring of licensing authority upon administrative agencies. The burden is upon private parties to apply for licenses or renewals. If agencies are dilatory in either kind of application, parties are subjected to irreparable injuries unless safeguards

are provided. The purpose of this section is to remove the threat of disastrous arbitrary and irremediable administrative action." (Senate Document No. 248, 79th Congress, 2d Session. Page 368).

The Senate Judiciary Committee print of S.7 dated June, 1945, contained explanations of each of the sections of the bill. The explanation of section 9(b) reads, in part, as follows:

> "This subsection is designed to ameliorate the difficulties where private parties are required to secure licenses. . . . The third sentence automatically extends a license in any case in which the licensee has made a timely application for renewal but the granting agency fails to act prior to the expiration of the existing license. A similar provision is contained in the licensing procedure act of the State of Ohio (Act of June 3, 1943, sec. 1, amending secs. 154-167 of the General Code; Amended substitute Senate Bill No. 36)." (Senate Document No. 248, 79th Congress, 2d Session, Page 35.)

The language of the third sentence of section 9(b) is not in actual conflict with the 180-day limitation of section 311(a), unless the pertinent portion of section 9(b) be construed as granting authority *to the Commission* to extend temporary licenses, rather than as a provision which extends temporary licenses by operation of law. If the first construction is adopted, there is an apparent inconsistency in the two provisions in that one permits issuance of temporary licenses for periods not to exceed 180 days and the other permits continuation of those licenses for longer periods. If the second construction is adopted, there is no inconsistency; although the authority granted to the

Commission remains subject to the 180-day limitation, Congress has provided for an automatic extension of certain of those licenses through section 9(b).

The language employed in section 9(b) supports adoption of the second construction. It provides that, upon establishment of the specified jurisdictional requirements, "*no license* with reference to any activity of a continuing nature *shall expire* . . .". It does not state that "no license shall be permitted to expire". It acts directly on the license itself.

In the proceeding below, appellants urged adoption of this second construction as decisive of this controlling issue. This argument appears to have been accepted by at least two of the three judges comprising the court below, who stated in their concurring opinion that, had this been a matter of first impression, they would have held that the Commission had not acted ultra vires.

In the *Stone's Express Case,* supra, this basis for harmoniously construing section 9(b) and the pertinent authority provision of the Interstate Commerce Act (there, section 210a(b)) was not urged upon the Court and was not considered by it. In that case it was argued that section 9(b) constituted an additional grant of licensing authority to the Commission. As a consequence, the court there viewed the statutes as being contradictory in terms; it found that section 9(b) was subsequent legislation* containing no

* The Administrative Procedure Act was subsequent legislation to section 210a(b), involved in the *Stone's Express Case*, and to section 311(b), which were not amended by the Second War Powers Act of 1942. As shown above, however, section 311(a), here involved and section 210a(a) had no 180-day limitations at the time of the enactment of the Administrative Procedure Act. Since the

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express repeal provision related specifically to the 180 day limitations in section 210a(b) of the Interstate Commerce Act; it found that there could be no implied repeal of the 180-day limitations; and it concluded, therefore, that the *Commission* had not been authorized to extend the 180-day license there involved beyond the 180-day initial period.

The function assigned to the Commission by section 9(b) does not constitute licensing. The fact that section 9(b) contemplates that the agencies involved shall prescribe rules governing the filing of timely and sufficient applications for renewal or new licenses, the fact that the Commission has prescribed such rules, and the further fact that the Commission issues its findings in the form of an order having the appearance of a grant *by the Commission* of an extension of the temporary license, cannot and do not change the essential legal character of the action accomplished. That action is an extension of the temporary license *by operation of law* (section 9(b)), and *not by operation of discretionary authority vested in the Commission*. The foregoing procedures of the Commission are in accordance both with the terms of section 9(b) and section 12 of the Administrative Procedure Act (5 U.S.C. 1011), which provides:

> "Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise."

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limitations were merely suspended, however, rather than repealed, this distinction is significant principally as an aid to determination of the legislative purpose. It also suggests that implied repeal of the section 311(a) limitation by section 9(b) is not involved, even assuming that they are in conflict.

To hold that the third sentence of section 9(b) provides only for permissive agency action in renewing temporary licenses, rather than extension through operation of the law, would defeat the very purpose of that provision. It was designed to overcome dilatory agency action. Licensees engaged in continuing activities were extended statutory protection against the irreparable harm of forced cessation of operations, resulting from delays in administrative processes and from arbitrary and unreasonable agency actions. Necessarily it was provided that the protection to the temporary licensees would come from the statute rather than from the agencies.

C. Assuming, Arguendo, That Section 9(b) Grants Additional Licensing Authority to Administrative Agencies Rather Than Extending Licenses by Operation of Law, the Canons of Statutory Construction Permit a Harmonious Reconciliation of Sections 311(a) and 9(b)

In construing the apparently conflicting portions of sections 9(b) of the Administrative Procedure Act and 311(a) of the Interstate Commerce Act, the question is presented whether, in light of the Congressional purpose so clearly expressed, the additional licensing power granted to the Commission by the third sentence of section 9(b), assuming such grant to be the effect of that provision, is to be subordinated to the "status quo ante" provision in the Second War Powers Act of 1942, by which the 180-day limitation was reinserted in section 311(a).

The usual aids to statutory construction support the view that the paramount legislative purpose is expressed in section 9(b) and that the "status quo ante" reinsertion of the 180-day limitation in section 311(a) should not be construed as a change in that purpose

nor a repeal by implication of the third sentence of section 9(b).

First, in light of the history set forth above, it is clear that section 9(b) represents specific legislation, whereas the automatic reinsertion of the 180-day limitation was the result of general legislation. The reinsertion was accomplished by section 1501 of the Second War Powers Act of 1942, which provided that at some distant time in the future the multitude of different statutory subject matters changed by that emergency legislation would be automatically restored to the status quo ante.

Second, section 9(b) represents the latest expression of legislative purpose. The reinsertion of the 180-day limitation on March 31, 1947, occurred as the result of legislation enacted five years earlier. The pertinent language of section 9(b) became law in 1946, and in light of conditions in existence at that time.

Third, the reinsertion of the 180-day limitation in section 311(a) should be viewed as subsequent legislation and, as such, is ineffective to accomplish implied repeal of the third sentence of section 9(b). In 1946 when section 9(b) became law, there was no 180-day limitation in section 311(a). (See II A above). The provisions of section 1501 of the Second War Powers Act of 1942 became operative, and accomplished the statutory changes provided therein, on April 1, 1947, with the expiration of that Act. As such, reinsertion of the 180-day limitation was legislation subsequent to the effective date of the Administrative Procedure Act—September 11, 1946. (It was not, however, the result of any contemporary change in Congressional

policy or purpose). Section 12 of the Administrative Procedure Act (5 U.S.C. 1011) provides:

> "No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly."

Section 1501, enacted in 1942, obviously could make no express mention of the Administrative Procedure Act and the reinsertion of the 180-day limitation in section 311(a), made effective by section 1501 on April 1, 1947, cannot therefore supersede or modify section 9(b) of the Administrative Procedure Act.

Fourth, construing section 9(b) as modifying section 311(a) is logical in that it does not render either section inapplicable to proceedings arising under the Interstate Commerce Act, but provides an appropriate function, consistent with their purposes, for each. Temporary authorities issued under section 311(a) may authorize either continuing or non-continuing activities; applications for such authorities may be accompanied by permanent authority applications or may not be. Pan-Atlantic's operation is an example of an activity or operation of a continuing nature accompanied by such an application. Activities of a non-continuing nature (and many applications under section 311(a) are granted to authorize them), at the minimum, consist of one trip, as, for example, the movement of one vessel-load of lumber from Coos Bay, Oregon, to Providence, R. I., or the transportation of passengers in excursion service for a particular trip or for a particular vacation season. The time limitation in section 311(a) initially applies to all authorities issued pursuant to its terms. Section

9(b) takes effect only in those instances involving continuing activities, and only when appropriate and timely applications for renewals or new licenses are filed. The 180-day limitation in section 311(a) continues to be fully effective in all other instances. The construction of these two sections here urged by appellants thus affords to each an appropriate legislative purpose.

The lower court's opinion in the *Stone's Express Case* would render the third sentence of section 9(b) completely nugatory, not only with respect to section 311(a) of the Interstate Commerce Act, but also with respect to sections 310a(b), 210a and 210a(b). These four sections represent all of the temporary licensing powers of the Commission, consequently, the rule of the *Stone's Express Case* would make the Interstate Commerce Act an implied exception to the provision contained in the third paragraph of section 9(b).

Congress did not intend to make a special exception of the Interstate Commerce Act. The Administrative Procedure Act applies to every agency of the Government of the United States, other than those specifically exempted by section 2 of that Act (5 U.S.C. Sec. 1001), or by other specific subsequent legislation. The Interstate Commerce Commission is not listed among the exempted agencies, and the Courts have consistently treated the Administrative Procedure Act as being applicable to the Interstate Commerce Act. (See annotation: "Administrative Procedure Act" 97 L. ed. 900-905). Exemption from any part of the Administrative Procedure Act must be express. *Marcello* v. *Bonds*, 349 U.S. 302, 99 L. ed. 1107. There are no express provisions in either the Administrative Procedure Act or the Interstate Commerce Act which

state that the third section of section 9(b) of the Administrative Procedure Act is not intended to be applicable to section 311(a) of the Interstate Commerce Act.

In the report of the Senate Committee on the Judiciary accompanying S.7, the following remarks applicable to the scope of the Administrative Procedure ~~Act~~ in general and its applicability to the Interstate Commerce Commission in particular were made:

> "In undertaking the foregoing very lengthy process of consideration, the committee has attempted to make sure that no operation of the Government is unduly restricted. *The Committee has also taken the position that the bill must reasonably protect private parties even at the risk of some incidental or possible inconvenience to or change in present administrative operations.* The Committee is convinced, however, that no administrative function is improperly affected by the present bill.
>
> "The Principal Problems. — The principal problems of the committee have been: First, to distinguish between different types of administrative operations. Second, to frame general requirements applicable to each such type of operation. Third, to set forth those requirements in clear and simple terms. Fourth, to make sure that the bill is complete enough to cover the whole field.
>
> "The Committee feels that it has avoided the mistake of attempting to over simplify the measure. It has therefore not hesitated to state functional classifications and exceptions where those could be rested upon firm grounds. *In so doing, it has been the unaviating policy to deal with types of functions as such and in no case with*

administrative agencies by name. Thus certain war and defense functions are exempted, but not the War or Navy Departments in the performance of their other functions. Manifestly, it would be folly to assume to distinguish between "good" agencies and the others, and no such distinction is made in the bill. *The legitimate needs of the Interstate Commerce Commission, for example, have been fully considered but it has not been placed in a favored position by exemption from the bill.*

"The Committee feels that administrative operations should be treated as a whole lest the neglect of some link defeat the purpose of the bill." (Emphasis added) (Senate Document No. 248, 79th Congress, 2d Session, pages 191-192).

From the foregoing statements it is apparent that Congress intended to have section 9(b) apply to all types of temporary licenses, unless an express provision in the Administrative Procedure Act to the contrary appeared. The Interstate Commerce Commission is, of course, one of the major licensing agencies. The Interstate Commerce Act, moreover, is one of the few Acts which uses the phrase "temporary" in connection with the granting of licenses. Yet, the reports of both Committees used the phrase "temporary permits or temporary licenses" in their references to section 9(b). (Senate Document No. 248, 79th Congress, 2d Session, Pages 212 and 275).

A perfectly reasonable construction may be placed upon both section 9(b) and section 311(a), which will permit both sections to exist harmoniously and effectively, thereby complying with the well established principle that "the purpose of statutory construction is to harmonize the law and save apparently conflicting

statutes from ineffectiveness." *Musselman Hub Brake Co.* v. *Commissioner*, 139 F. Supp. 2d 65. The proper construction is that the 180-day limitation in section 311(a) be given full force and effect, except that section 9(b) be treated as a proviso to section 311(a), removing its application under the circumstances specified in section 9(b).

D. The Settled Construction by the Commission of the Statutes Involved Is Entitled to Great Weight

The Commission has administered the statutes involved, consistent with the construction applied to them by appellants herein, since the expiration of the Second War Powers Act in 1947. It has promulgated rules in accordance with the rule-making provisions of the Administrative Procedure Act for the extension of licenses under the third sentence of section 9(b) of that Act, as that Act contemplated. Those rules are necessary to provide a procedure for determining the applicability of section 9(b) to particular situations in light of the jurisdictional findings required to be made. Those rules also provide a method by which the Commission's order, essentially a declaratory order, may establish whether a particular license is extended or renewed pursuant to section 9(b). Congress clearly contemplated that the agencies directly affected would take the necessary actions in the first instance to implement the provisions of that Act. Assuming that section 9(b) may be construed to be a substantive extension of the Commission's licensing powers, then the Commission's rules are clearly essential to implement its licensing powers. Thus, under either construction of the effect of section 9(b), the Commission is obligated, in the first instance, to construe the meaning and effect of section 9(b).

On September 16, 1947, the Commission issued a public notice, couched in the language of section 9(b) of the Administrative Procedure Act, in which the Commission stated that temporary authorities issued by the Commission would continue in effect until the final determination of corresponding permanent certificate applications. Subsequently on July 6, 1948, the Commission issued formal rules spelling out in detail the manner in which the words "timely and sufficient" and "activity of a continuing nature" would be interpreted for the purposes of section 9(b) as applied to section 311(a) (Appendix D). The Commission has consistently applied such rules from their inception in 1947 until the present date.

Each year commencing with 1947 the Commission, in its Annual Report to Congress, set forth in detail the number of temporary authorities extended pursuant to section 9(b). Hundreds of motor carriers and water carriers, in reliance upon this long settled construction of these statutes, have established at considerable expense, and are operating, common carrier service under grants of temporary authority, pending the final determination of their applications for permanent authority.

The Courts have consistently held that both contemporaneous and long settled construction of an Act by the Agency responsible for its administration should receive much consideration. In *United States* v. *Alabama Railroad Company*, 142 U.S. 615, 35 L. Ed. 1134 (1892), at page 621, this Court said:

> "We think the contemporaneous construction thus given by the Executive Department of the Government, and continued for nine years through six different administrations of that department

—a construction which, though inconsistent with the literalism of the Act, certainly consorts with the equities of the case—should be considered as decisive in this suit. It is a settled doctrine of this Court, in case of ambiguity, the Judicial Department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change whereby parties that have contracted with the Government upon faith of such construction may be prejudiced."

Likewise, in *Fawcus Machine Company v. United States*, 282 U.S. 375, 75 L. Ed. 397 (1931), at page 377, this Court said, with respect to an interpretative regulation of the type here in question:

"They constitute contemporaneous construction by those charged with the administration of the Act, are for that reason entitled to respectful consideration, and will not be over-ruled except for weighty reasons."

See also: *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 84 L. Ed. 1345 (1940); *Boutell v. Walling*, 148 F. 2d 329 (6th C.C.A., 1945); *United States v. Kocmond*, 200 F. 2nd 370 (7th C.C.A., 1952).

Congress itself appears to have accepted for its own use this construction of section 9(b). In Senate Document No. 72, 82d Congress, 1st Session, which is a print of the Interstate Commerce Act, pursuant to Senate Resolution No. 205, for the use of the Senate Committee on Interstate and Foreign Commerce and for the use of the Senate Document Room, Section

311(a) thereof carries a specific reference note reading: "See also the last sentence of section 9(b) of the Administrative Procedure Act, 5 U.S.C., Section 1008(b), *infra*." When the construction applied by an administrative agency to a statute has been consistently followed for a number of years with the knowledge and acquiescence of Congress, it is entitled to even greater weight. See *Norwegian Nitrogen Company* v. *United States*, 288 U.S. 294, 77 L. ed. 796 (1933).

We submit that, even if section 9(b) is regarded as an extension of the licensing authority of the Commission, and therefore must be reconciled with the specific limitation on that authority in section 311(a), the canons of statutory construction, the clear intent of Congress, and the long established practice of the administrative agency with the knowledge and consent of Congress, all require that section 9(b) of the Administrative Procedure Act be held applicable to temporary licenses issued under section 311(a) of the Interstate Commerce Act.

III. THE DISTRICT COURT ERRED IN APPLYING THE RULE OF STARE DECISIS IN RELIANCE ON THE STONE'S EXPRESS CASE.

The decision of the District Court in this case stated (Appendix A) (Tr. 30-31):

> "This case is ruled in principle by the decision of this court in *Stone's Express, Inc.* v. *United States*, 122 F. Supp. 955 (1954). Our judgment was subsequently vacated for mootness pursuant to stipulation of the parties, *Interstate Commerce Commission* v. *Stone's Express, Inc.*, 350 U.S. 906 (1955). Though that case involved the 180 day limitation in section 210a(b) of the Interstate

> Commerce Act (49 U.S.C. Sec. 310a(b)), the issue as to the Commission's power is essentially the same. We think, consistent with the usual deference to precedent common in this court, we should adhere to the conclusion reached in *Stone's Express Inc.* v. *United States,* supra."

In a concurring opinion, Judge Wyzanski stated:

> "I concur exclusively on the ground that I always defer to an earlier decision by my brethren, except where the decision is remote in time, or except where the court seems to me to have been inescapably wrong. Neither of these conditions is present here. However, in order to make clear the desirability of a Supreme Court review of the problem, I add that were the matter *res integra,* and were I not, as I conceive, bound by the ruling in *Stone's Express, Inc.* v. *United States,* D. Mass. 122 F. Supp. 955 (1954), I should conclude that, by virtue of sec. 9(b) of the Administrative Procedure Act, 60 Stat. 242, the I.C.C. did not act *ultra vires* in entering its order of October 28, 1955. I am authorized to state that Judge Ford agrees with this view".

Thus, two of the three judges have expressly stated that, in their opinion, on the merits of the question presented, judgment should have been for the defendants. The only reason given for not entering such judgment was the precedent of *Stone's Express, Inc.* v. *United States,* supra.

We submit that the *Stone's Express Case* decision is not a proper basis for application of the doctrine of *stare decisis.*

The rule of *stare decisis* has as its objective the establishment of precision and certainty in the law. Essentially it is a doctrine of estoppel applied to court

decisions. When a judicial principle or statutory interpretation has been announced and rights of individuals have been settled, or contracts made, on the basis thereof, public policy requires the preservation of, and continued adherence to, such principle or interpretation, except for the most cogent reasons warranting a departure therefrom. *McGruder* v. *Bank of Washington*, 9 Wheat (U.S.) 598, 6 L. ed. 170; *Gilman* v. *Philadelphia*, 3 Wall. (U.S.) 713, 18 L. ed. 96; 14 *American Jurisprudence*, pp. 284-285; 21 *Corpus Juris Secundum*, pp. 302-304.

The issue which the District Court was considering in the *Stone's Express Case* was one of first impression. It was truly a matter *res integra*. The court concluded that section 9(b) of the Administrative Procedure Act did not apply to temporary authorities granted under section 210a(b) of the Interstate Commerce Act. An appeal was taken to this court and probable jurisdiction was noted (348 U.S. 885, 99 L. ed. 969). Thereafter, because of final action by the Commission on the application for permanent authority prior to consideration of the case by this Court, and upon a stipulation of mootness by the parties, this Court remanded the case to the District Court with instructions to dismiss the action for mootness. (350 U.S. 906, 100 L. ed. 125). The District Court accordingly vacated its judgment.

Thus, the *Stone's Express Case* has never adjudicated rights between any persons, nor has there been any reliance by the Commission on the *Stone's Express Case* decision. It has subsequently permitted water carriers and motor carriers to continue operating under expired temporary licenses, while their permanent authority applications are pending, in the firm

belief that despite that decision section 9(b) of the Administrative Procedure Act has continued the effectiveness of those licenses.

The reasons for applying the rule of *stare decisis* do not exist, therefore, in this case. The *Stone's Express Case* decision has not established a statutory construction upon which persons have relied and which, therefore, should operate as an estoppel. This case is the only other case in which this issue has been presented to a court, and in view of the status of the decision in the *Stone's Express Case,* the matter in question is, in fact, *res integra* in this case.

The District Court in this case was presented with valid arguments which were not before it in the *Stone's Express Case;* on the basis of such facts and arguments, the majority of the District Court in this case has concluded that the decision reached in the earlier case was erroneous. The proper administration of justice would appear to require that the District Court in this proceeding enter a judgment consistent with its conclusions on the merits of the case, since the District Court is not, in fact, constrained by the reasons and purposes underlying the doctrine of *stare decisis* to follow the *Stone's Express Case.*

CONCLUSION

The harmonious construction of section 9(b) and section 311(a) urged by appellants is consistent with the Congressional objective sought to be accomplished, the protection to license holders against interrruptions in operations resulting from delays in agency procedures. The cost to a shipping company of initiating

a new service is considerable, involving, as it does, moving ships in non-revenue service to new ports of loading, establishing administrative and sales organizations, securing port facilities, and meeting various regulatory requirements—all in advance of initiating revenue producing activities and requiring several weeks to complete. In face of a fixed 180-day limitation in temporary authorities and the knowledge that Commission procedures in connection with permanent applications require 12 months or more, few operators would be willing to initiate continuing services even to meet emergency needs. If one did so, and were required temporarily to discontinue it at the termination of the 180-day period, the same types of expenses would be incurred both in discontinuing the service and in beginning it again. The injury to the operator, Pan-Atlantic in this case, if forced to discontinue service temporarily, would indeed be irreparable and severe. The rule of decision enunciated in this case, having logical application to extended licenses originally issued pursuant to section 210a(a), 210a(b), and 310(b), will have considerable economic effect in the transportation industry.

The statutory construction, which appellant has expressed herein, provides a logically sound basis for preserving to these operators the protection intended by Congress to have been afforded them by section 9(b), without doing violence to the language of section 311(a). It should be adopted by this Court.

Wherefore, the appellant, Pan-Atlantic Steamship Corporation, respectfully prays that this Court reverse the judgment of the District Court and remand this

case to the District Court with instructions to enter judgment for the appellant.

Respectfully submitted,

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February 22, 1957

Proof of Service

I, David G. Macdonald, one of the attorneys for Pan-Atlantic Steamship Corporation, appellant herein, and a member of the bar of the Supreme Court of the United States hereby certify that on the 22nd day of February, 1957, I served copies of the foregoing document on the counsel for the several parties to this proceeding, by mailing a copy in a duly addressed envelope, by first-class mail, postage prepaid, to each of the following:

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Representing the United States:

3. Honorable J. Lee Rankin
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   Department of Justice
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DAVID G. MACDONALD

APPENDIX A

Opinion of the United States District Court for the District of Massachusetts in *Atlantic Coast Line R. R. Co. et al. v. United States, et al.*, Civil Action No. 56-232-W, dated May 17, 1956:

Per Curiam. The amended complaint herein seeks a decree from us setting aside an order of the Interstate Commerce Commission.

On or about May 5, 1955, Pan-Atlantic Steamship Corporation made application to the Commission for permanent authority to operate as a common carrier by water between certain Atlantic and Pacific ports.

While this application was pending, upon application by Pan-Atlantic Steamship Corp., for temporary authority under Sec. 311(a) of the Interstate Commerce Act, as amended (49 U. S. C. Sec. 911(a)), the Commission issued its order on May 18, 1955, granting authority to Pan-Atlantic Steamship Corp., to operate as a common carrier by water between certain named Atlantic and Pacific ports, up to and including November 14, 1955.

Subsequently, by order entered October 28, 1955, the Commission authorized Pan-Atlantic Steamship Corp., to continue to perform such temporary water carrier service, until further order of the Commission, but not beyond the time the pending application for permanent authority should have been determined. This order of October 28, 1955, is the one complainants seek to have us annul, on the ground that it constitutes an *ex parte* extension of temporary authority beyond the maximum period of 180 days prescribed in Sec. 311(a). The Commission, on the other hand, claims that its more extended order is sanctioned by Sec. 9(b) of the Administrative Procedure Act (60 Stat. 242).

This case is ruled in principle by the decision of this court in *Stone's Express, Inc.* v. *United States*, 122 F.

Supp. 955 (1954). (Our judgment was subsequently vacated for mootness pursuant to stipulation of the parties, *Interstate Commerce Commission* v. *Stone's Express, Inc.*, 350 U. S. 906 (1955).) Though that case involved the 180-day limitation in Sec. 210a(b) of the Interstate Commerce Act (49 U. S. C. Sec. 310a(b)), the issue as to the Commission's power is essentially the same. We think, consistent with the usual deference to precedent common in this Court, we should adhere to the conclusion reached in *Stone's Express, Inc.* v. *United States, supra.*

The plaintiffs' motion for summary judgment is granted, and a permanent injunction will be entered requiring the Commission to set side and annul its order of October 28, 1955, in so far as that order continues the temporary operation previously authorized by the Commission.

WYZANSKI, *District Judge.* I concur exclusively on the ground that I always defer to an earlier decision by my brethern, except where the decision is remote in time, or except where the court seems to me to have been inescapably wrong. Neither of these conditions is present here. However, in order to make clear the desirability of a Supreme Court review of the problem, I add that were the matter *res integra*, and were I not, as I conceive, bound by the ruling in *Stone's Express, Inc.* v. *United States*, D. Mass., 122 F. Supp. 955 (1954), I should conclude that, by virtue of Sec. 9(b) of the Administrative Procedure Act, 60 Stat. 242, the I. C. C. did not act *ultra vires* in entering its order of October 28, 1955. I am authorized to state that Judge Ford agrees with this view.

APPENDIX B

Opinion of the United States District Court for the District of Massachusetts in *Stone's Express Inc.* v. *United States*, 122 F. Supp. 955, 1954:

HARTIGAN, Circuit Judge

This is an action brought against the United States of America and the Interstate Commerce Commission under the provisions of 28 U. S. C. §§ 1336, 2321, through 2325, inclusive, in which the plaintiff seeks to enjoin and vacate an order of the Commission dated January 19, 1954, granting to St. Johnsbury Trucking Co. Inc., temporary approval to lease all the operating rights of Hinsch Transportation Co. Inc. St. Johnsbury and Hinsch intervened as parties defendants under the provisions of 28 U. S. C. § 2323.

On April 12, 1954, the plaintiff, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, 28 U. S. C., made a motion for an order granting it judgment on the pleadings. The material allegations of the complaint admitted by the defendants and the intervenors and the orders of the Commission annexed to the pleadings establish the following facts.

The plaintiff, a Massachusetts corporation, is engaged in interstate commerce as a motor common carier under a Certificate of Public Convenience and Necessity issued by the Commission. On November 27, 1951, St. Johnsbury, a Vermont corporation, and Hinsch, a New York corporation, both common carriers operating under Certificates of Public Convenience and Necessity issued by the Commission, filed a joint application under Section 5 of the Interstate Commerce Act, 49 U. S. C. A. § 5, for approval of a proposed purchase by St. Johnsbury of Hinsch's certificate. Simultaneously with the filing of said application, St. Johnsbury and Hinsch sought temporary authority under Section 210a(b) of the Interstate Commerce Act, 49 U. S. C. A. § 310a(b), to conduct opera-

tions for which permanent authority was sought in the Section 5 application. On December 18, 1951, Division 4 of the Commission entered an order which granted the application under Section 210a(b) and authorized St. Johnsbury to lease all the operating rights of Hinsch for a period not exceeding 180 days. On June 3, 1952, Division 4 entered an order extending the temporary authority previously granted by the December 18, 1951, order until "* * * the application filed herein for authority under Section 5 of the Interstate Commerce Act is 'finally determined' as that term is defined * * *" in 49 Code Fed. Regs. §§ 2.1 to 2.3. By an order dated July 2, 1953, Division 4 denied the Section 5 application of St. Johnsbury and Hinsch, but subsequent orders postponed the termination of St. Johnsbury's temporary authority granted by the December 18, 1951 and June 3, 1952 orders until December 15, 1953. On January 19, 1954, the Commission vacated and set aside the July 2, 1953 order of Division 4, and entered an order which approved the Section 5 application and extended the temporary authority previously granted to St. Johnsbury. The plaintiff's petition for reconsideration of this order with respect to the extension of the temporary authority was denied by the Commission on February 23, 1954. By subsequent orders dated April 5, 1954, and April 30, 1954, St. Johnsbury was authorized to purchase the operating rights of Hinsch between July 5, 1954 and August 4, 1954, and effective with the consummation of the authorized transaction or 30 days from July 5, 1954, whichever first occurs, the temporary authority granted by the order entered on December 18, 1951 as amended by the order entered on June 3, 1952 was to be of no further force and effect.

The sole issue presented by the plaintiff's motion for judgment on the pleadings is whether or not the Commission properly granted St. Johnsbury temporary approval to lease all of Hinsch's operating rights for a period exceeding 180 days. The plaintiff argues that under the

provisions of Section 210a(b) of the Interstate Commerce Act, 49 U. S. C. A. § 301a(b), the Commission is prohibited from granting a temporary approval beyond a period of 180 days. The defendants, on the other hand, contend that by the third sentence of Section 9(b) of the Administrative Procedure Act, 5 U. S. C. A. § 1008(b). St. Johnsbury had the right to operate Hinsch's property under its temporary approval until such time as the Commission finally determined the Section 5 application for permanent authority.

The clear and unambiguous language of Section 210a(b) of the Interstate Commerce Act and of Section 9(b) of the Administrative Procedure Act, and their legislative history, compel us to hold that the third sentence of Section 9(b) does not apply to a temporary approval granted by the Commission under Section 210a(b).

The defendants rely solely on the temporary approval granted to St. Johnsbury by the Commission to sustain their contention that St. Johnsbury was a "licensee" within the meaning of the third sentence of Section 9(b) of the Administrative Procedure Act. Under the provisions of Section 210a(b), St. Johnsbury obtained the temporary approval to lease all the operating rights of Hinsch only by virtue of having previously filed a Section 5 application for permanent authority. The third sentence of Section 9(b), however, in using the words "In any case in which the *licensee* has * * * made timely and sufficient application for a renewal or a new license, * * *" indicates that the statute presupposes at the time of the filing of the application the existence of a licensee. (Italics ours). The language of the statute thus clearly reveals that it was designed to prevent a license in existence at the time of the filing of the application for a renewal or a new license from terminating until the agency has finally determined whether or not to grant the renewal of the new license. But, at the time St. Johnsbury filed its Section 5 application, it did not have a license per-

mitting it to lease Hinsch's operating rights. It obtained its temporary approval to lease all of Hinsch's operating rights only *after* the Section 5 application had been filed. St. Johnsbury is not, therefore, a "licensee" within the meaning of the third sentence of Section 9(b) and does not have the right by virtue of that statute to lease Hinsch's operating rights until the Commission finally determines the Section 5 application.

In addition, the legislative history of the third sentence of Section 9(b) indicates that the statute was only intended to apply to licenses existing at the time of the filing of the application for renewal or a new license.

The Senate Judiciary Committee Print, June 1945 of the Administrative Act gives the following explanation of Section 9(b):

> "This subsection is designed to ameliorate the difficulties where private parties are required to secure licenses. * * * The third sentence automatically extends a license in any case in which the licensee has made timely application for renewal but the granting agency fails to act prior to the expiration of the existing license. A similar provision is contained in the licensing procedure act of the State of Ohio (Act of June 3, 1943, sec. 1 amending secs. 154-167 (sic) of the General Code; Amended substitute Senate bill No. 36)." Page 35 of Senate Doc. No. 248, 79th Cong. 2d. Sess., entitled "Administrative Procedure Act, Legislative History 79th Congress".

Said Ohio Act referred to the Senate Judiciary Committee Print and found in Vol. 120, p. 361, Laws of Ohio (1943, 1944), states in part:

> "No licensee shall be required to discontinue the operation of a business or profession because of the failure of an agency to accept or reject said licensee's application for a new license of the same type or class,

or renewal of an existing license, or application for registration, prior to the expiration of the license *held by said licensee at the time said application was made* where said application was filed with the agency within the time and in the manner provided by statute or rule of the agency". (Italics ours.)

Also, prior to the passage of the Administrative Procedure Act, there is no doubt that under the facts of the instant case the Commission only had authority to grant a temporary approval for a period not exceeding 180 days by the provisions of Section 210a(b). The defendants, therefore, in arguing that the Commission now has authority to grant a temporary approval exceeding 180 days by virtue of the enactment of the Administrative Procedure Act, in effect contend that the third sentence of Section 9(b) repeals Section 210a(b) by implication. The Supreme Court, however, has frequently stated that a statute will not be held to repeal a prior statute by implication unless no other reasonable construction is possible. *Posadas* v. *National City Bank*, 1936, 296 U.S. 497, 56 S.Ct. 349, 80 L.Ed. 351; *United States* v. *Jackson*, 1938, 302 U.S. 628, 58 S.Ct. 390, 82 L.Ed. 488; *United States* v. *Borden Co.*, 1939, 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181. The intention of the legislature to repeal "* * * must be clear and manifest." *Red Rock* v. *Henry*, 1882, 106 U.S. 596, 602, 1 S.Ct. 434, 439, 27 L.Ed. 251. There must be a "positive repugnancy between the provisions of the new laws and those of the old". *Wood* v. *United States*, 1842, 16 Pet. 342, 363, 10 L.Ed. 987. We find no such repugnancy between the provisions of §§ 210a(b) and 9(b). Section 210a(b) in clear and unambiguous terms states that the Commission may grant temporary approval for a period *not exceeding 180 days*. In holding that the third sentence of §§ 9(b) does not apply to the temporary approval granted to St. Johnsbury, we are, therefore, following the well established rule of giving effect to both

statutes covering the same general subject matter. *United States* v. *Borden Co., supra.*

A final contention of the defendants is that the Commission pursuant to Section 12 of the Administrative Procedure Act, 5 U. S. C. A. § 1011, published its interpretation of the third sentence of Section 9(b) in which it construed that sentence as being applicable to temporary approvals granted under Section 210a(b). The contemporaneous and continued construction of the Commission is entitled to great weight. *United States* v. *Alabama Railroad Co.*, 1892, 142 U.S. 615, 12 S.Ct. 306, 35 L.Ed. 1134; *U.S.* v. *America Trucking Assn's*, 1940, 310 U.S. 534, 60 S. Ct. 1059, 84 L.Ed. 1345. But, because the provisions of §§ 210a(b) and 9(b) are unambiguous and their directions specific, "* * * there is no power to amend it by regulations." *Koshland* v. *Helvering*, 1936, 298 U.S. 441, 447, 56 S.Ct. 767, 770, 80 L.Ed. 1268; See *Alaska Steamship Co.* v. *U.S.*, 1933, 290 U.S. 256, 54 S.Ct. 159, 78 L.Ed. 532; *Social Security Board* v. *Nierotko*, 1946, 327 U.S. 358, 66 S.Ct. 637, 90 L.Ed. 718. ". * * * Inconvenience or hardships, if any, that result from following the statute as written, must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority * * *" with respect to the granting of temporary approvals under section 210a(b), *United States* v. *Mo. Pac. R. Co.*, 1929, 278 U.S. 269, 277, 278, 49 S.Ct. 133, 136, 73 L.Ed. 322.

The plaintiff's motion for judgment on the pleadings is granted and a permanent injunction will be entered requiring the Commission to set aside and annul its order of January 19, 1954, insofar as that order continues the temporary operations authorized by the Commission.

APPENDIX C

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C. on the 28th day of October, A.D. 1955

No. W-376 (*Sub-No. 11*)

Pan-Atlantic Steamship Corporation

Temporary Authority—Intercoastal Trade

No. W-376 (Sub-No. 12)

Pan-Atlantic Steamship Corporation

Temporary Authority—Intercoastal Trade (2)

It appearing, That by order of May 18, 1955, the Commission, Division 4, granted Pan-Atlantic Steamship Corporation, temporary authority to operate as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation (1) of passenger and commodities generally (a) from Philadelphia, Pa., Baltimore, Md., Charleston, S. C., Jacksonville and Miami, Fla., to Seattle, Wash., Portland, Oreg., San Francisco, Oakland, Alameda and Los Angeles Harbor, Calif., (b) from San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor to Boston, Mass., New York Harbor, N. Y., Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (c) from Seattle and Portland to Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (2) of passengers between New Orleans, La., and Houston, Tex., on the one hand, and, on the other, Seattle, Portland, San Francisco, Oakland, Alameda Stockton and Los Angeles Harbor.

It further appearing That there is a public need for continuance of the said water carrier service, that it is an activity of a continuing nature, and that this service corresponds in part with that which the carrier by application No. W-376 (Sub. No. 13) seeks a certificate of public

convenience and necessity; and good cause appearing therefore:

It is ordered, That said carrier be, and it is hereby authorized to continue to perform said water carrier service until further order of the Commission, but not beyond the time said application No. W-376 (Sub. No. 13) has been finally determined.

By the Commission, Division 4.

HAROLD D. McCOY
Secretary

(SEAL)

APPENDIX D

Excerpts From Cited Statutes and Regulations

(1) *Interstate Commerce Act*

Section 210a (49 U. S. C., Sec. 310a)

(a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

(b) Pending the determination of an application filed with the Commission for approval of a consolidation or merger of the properties of two or more motor carriers, or of a purchase, lease, or contract to operate the properties of one or more motor carriers, the Commission may, in its discretion, and without hearings or other proceedings,

grant temporary approval, for a period not exceeding one hundred and eighty days, of the operation of the motor carrier properties sought to be acquired by the person proposing in such pending application to acquire such properties, if it shall appear that failure to grant such temporary approval may result in destruction of or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their future usefulness in the performance of adequate and continuous service to the public.

Section 311. (49 U. S. C., Sec. 911)

(b) Pending the determination of an application filed with the Commission under this Act for approval of a consolidation or merger of the properties of two or more water carriers, or of a purchase, lease, or contract to operate the properties of one or more water carriers, the Commission may, for good cause shown, and without hearings or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days, of operation of the properties of such carriers by water by the person proposing to acquire them, as aforesaid.

(2) *Administrative Procedure Act*

Section 12. (5 U. S. C., 1011)

Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to super-

sede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

(3) *Second War Powers Act of 1942* (56 Stat. 177, March 27, 1942)

Section 102. Subsection (a) of section 210 of said Act, as amended (U. S. C. 1940 ed., Title 49, section 310a(a)), is hereby amended by striking out the words "but for not more than an aggregate of one hundred and eighty days."

Section 103. Subsection (a) of section 311 of said Act, as amended (U. S. C. 1940 ed., Title 49, section 911(a)), is hereby amended by striking out the words "but not for more than an aggregate of one hundred and eighty days."

Section 1501. Titles I to IX inclusive and Titles XI to XIV of this Act, and the amendments to existing law made by any such title shall remain in force only until December 31, 1944, or until such earlier time as the Congress by concurrent resolution, or the President, may designate, and after such amendments cease to be in force any provision of law amended thereby shall be in full force and effect as though this Act had not been enacted; but no court proceedings brought under such title shall abate by reason of the termination thereunder of such title.

(4) *Amendment to Second War Powers Act* (60 Stat. 345, June 29, 1946)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that Title XV, section 1501, of the Second War

Powers Act, 1942, approved March 27, 1942, as amended, is amended to read as follows:

Section 1501. Titles I to IV, V, VII, and XIV, of this Act, and the amendments to existing law made by any such title, shall remain in force only until March 31, 1947, or, until such earlier time as the two Houses of Congress by concurrent resolution, or the President may designate, and Title III of this Act, and the amendments to existing law made by such title, shall remain in force only until March 31, 1947, except that for purposes of allocations of building materials, and facilities related to the utilization of building materials, such Title III, and the amendments to existing law made by such title, shall remain in force until June 30, 1947, or until such earlier time as the two Houses of Congress by concurrent resolution, or the President, may designate, and after such amendments cease to be in force, any provisions of law amended thereby shall be in full force and effect as though this Act has not been enacted; but no court proceedings brought under any such title shall abate by reason of the termination hereunder of such title.

(5) *Interstate Commerce Commission Rules* (49 C. F. R. 2.1-2.4)

Section 2.1 *Extension of Temporary Operating Authority or Approval.* The Commission will determine upon written request by any interested party, or it may determine upon its own initiative, whether under Section 9(b) of the Administrative Procedure Act (5 U. S. C. 1008(b)):—

(a) any temporary operating authority granted under 210a(a) or 311(a) of the Interstate Commerce Act (49 U. S. C. 310a(a), 911(a)) is continued in force, beyond the expiration date specified in such temporary operating authority until the determination of an application filed by the holder of such temporary operating authority for a certificate of public convenience and necessity or a per-

mit to engage in operations authorized by such temporary operating authority.

(b) Any temporary approval granted under Section 210a(b) or 311(b) of the Interstate Commerce Act (49 U. S. C. 310a(b), 911(b)), is continued in force, beyond the expiration date specified in such temporary approval, until the determination of the related application for approval of a consolidation or merger of the properties of two or more motor or water carriers or of a purchase, lease, or contract to operate the properties of one or more such carriers.

In order to afford sufficient time for consideration and action thereon, a written request for such a determination should be filed not later than 30 days prior to expiration of the temporary operating authority or approval.

Section 2.2 *Definitions and Interpretations.* In making the determination provided in Section 2.1, the Commission will be guided by the following interpretations of the provisions of the 3rd sentence of Section 9(b) of the Administrative Procedure Act (5 U. S. C. 1008(b)), and of the provisions of Section 210a(a) of the Interstate Commerce Act (49 U. S. C. 310a(a)):

(a) "Timely Application."—An application for a certificate of public convenience and necessity or a permit filed in accordance with the applicable laws, regulations, and instructions, not later than 60 days after issuance of temporary authority for a period of 180 days or not later than 60 days after issuance of the first of a series of consecutive temporary authorities aggregating 180 days.

(b) "Sufficient Application."—An application for a certificate of public convenience and necessity or a permit, which is in the form, contains the information, and is accompanied by the documents and exhibits required by the applicable laws, regulations, and instructions.

(c) "Aggregate of 180 days."—As used in Section 210a(a) of the Act and Commission notices and orders relating thereto, the term "for not more than an aggregate of one hundred and eighty days" means the total number of days of temporary authority which may be granted to a motor carrier under the provisions of that Section of the Act to meet a continuing need for a particular service.

(d) "Series of grants."—As relates to extensions of temporary authorities under Section 9(b) of the Administrative Procedure Act [5 U. S. C. 1008(b)], only those grants of temporary authority for less than 180 days which have been approved to meet a specific continuing need and which follow one after the other without interruption for a total of 180 days will be considered as a "series of consecutive temporary authorities aggregating 180 days."

(e) "Need considered not to be of a continuing nature."—Any need which is the basis of an operation authorized by a temporary authority or approval to be conducted for a period of less than an aggregate of 180 days is presumed not to be of a "continuing nature" unless the Commission otherwise expressly determines.

(f) "Final determination of Application."—For the purpose of this Section—

(1) An application for a certificate or permit shall be considered to be "finally determined" (i) with respect to operations for which the certificate or permit is denied, upon the expiration of the period allowed by the rules and regulations of the Commission or by the order (whichever is greater) within which petitions for rehearing, reargument, or reconsideration may be filed, or upon the denial of such petitions if filed, and (ii) with respect to operations for which the certificate or permit is granted, when the certificate or permit becomes effective.

(2) An application for approval of a consolidation or merger of the properties of two or more motor or water

carriers, or of a purchase of the properties of one or more such carriers shall be considered to be "finally determined," (i) in the case of denial of such an application, upon the expiration of the period allowed by the rules and regulations of the Commission or by the order (whichever is greater) within which petitions for rehearing, reargument, or reconsideration may be filed, or upon the denial of such petitions if filed, and (ii) in the case of approval of such an application, when the certificate or permit to be transferred in connection with such application has been reissued in the name of the transferee and has become effective.

(3) An application for approval of a lease or contract to operate the properties of one or more motor or water carriers shall be considered to be "finally determined," (i) in the case of denial of such an application, upon the expiration of the period allowed by the rules and regulations of the Commission or by the order (whichever is greater) within which petitions for rehearing, reargument, or reconsideration may be filed, or upon the denial of such petitions if filed, and (ii) in the case of approval of such an application, when the order approving such application becomes effective.

Section 2.3 *Additional Grant for New Need.* If the need for a particular service ceases and the temporary authority covering such need expires or is revoked and a new or separate need arises subsequent to such expiration or revocation, additional temporary authority for the 180-day aggregate, or for a shorter period, may be granted to the same carrier for the service notwithstanding the prior grant or grants. However, an application filed after the expiration or revocation of temporary authority for an aggregate of 180 days will be denied unless the facts clearly show that the application is in reality based on a new need and not on a continuation of the need on which the prior grant of authority was based.

Section 2.4 *Termination of Temporary Authority or Approval.* Nothing in these rules shall be construed as preventing the Commission from terminating at any time, in accordance with law, any temporary authority or approval, or any extension thereof under Section 9(b) of the Administrative Procedure Act (5 U. S. C. 1008(b)).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 408

PAN-ATLANTIC STEAMSHIP CORPORATION, *Appellant*

v.

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, SOUTHERN RAILWAY SYSTEM, and THE NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY, *Appellees*

Appeal from the United States District Court for the District of Massachusetts

REPLY BRIEF OF PAN-ATLANTIC STEAMSHIP CORPORATION, APPELLANT

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Appeal from the United States District Court for the District of Massachusetts

---

REPLY BRIEF OF PAN-ATLANTIC STEAMSHIP CORPORATION, APPELLANT

The opinion of the District Court in the case under appeal (144 F. Supp. 53) recited no reasons in support of the judgment for the plaintiffs (appellees) other than that, under the rule of *stare decisis*, the

decision in this case was governed by the decision of the same Court in *Stone's Express, Inc.* v. *United States*, 122 F. Supp. 955. In our opening brief before this Court, we addressed ourselves to the two grounds upon which the District Court based its decision in the *Stone's Express Case:* first, that section 9(b) of the Administrative Procedure Act requires, as a condition precedent to its applicability, that the applicant for a new or renewal license be a license holder at the time the application for the new or renewal license is filed; and second, that the license extension provision of section 9(b) is inconsistent with the 180 day licensing limitation in section 210a(b) of the Interstate Commerce Act, and that section 9(b) cannot be construed as amending section 210a(b) by implication.

The appellees, in their briefs, have raised two new issues, neither of which was considered by the District Court in the *Stone's Express Case,* nor presumably, by the District Court in this case: first, whether section 9(b) acts to extend the expiration date of a license only when the application filed by the licensee is for a new or renewal license of the "same type or class"; and second, whether the construction of section 9(b) urged by the appellants is contrary to the legislative purpose of the certificate provisions of the Interstate Commerce Act.

This reply brief is limited to these two new issues, and to the rebutting of certain contentions in appellees' briefs, which appellant believes to be factually erroneous.

I. SECTION 9(b) OF THE ADMINISTRATIVE PROCEDURE ACT DOES NOT REQUIRE THAT THE EXPIRING LICENSE AND THE LICENSE APPLIED FOR BE IDENTICAL IN FORM

A. The Record Does Not Support the Conclusion That Congress Intended Section 9(b) to be Construed as if It Contained the Words "License of the Same Type or Class" as Found in the Ohio Statute

The Senate Judiciary Committee Print, June 1945, of the Administrative Procedure Act, after explaining the purpose of section 9(b), stated (Page 35, Senate Doc. No. 248, 79th Cong. 2d Sess.):

> "A similar provision is contained in the licensing procedure act of the State of Ohio."

The "similar provision", to which reference was made, is found in Vol. 120, p. 361, Laws of Ohio (1943-44), and reads as follows:

> "No licensee shall be required to discontinue the operation of a business or profession because of the failure of an agency to accept or reject said licensee's application for a new license *of the same type or class,* or renewal of an existing license, or application for registration, prior to the expiration of the license held by said licensee at the time said application was made and where said application was filed with the agency within the time and manner provided by statute or rule of the agency." (Emphasis added.)

Nowhere in the legislative history of the Administrative Procedure Act is there even a suggestion that Congress had received any information or explanation concerning the background, interpretation, or application of the Ohio statute. The record indicates that the Senate Judiciary Committee based its reference to the "similarity" of the two statutes solely upon the

bare language of the Ohio statute. Nevertheless, the appellees have seized upon this passing comment of the Committee and from it have endeavored to draw the inference that Congress intended section 9(b) to be construed as if it had been written *verbatim* in the form of the Ohio statute. On the basis of this assumed Congressional intent, the appellees construe section 9(b) as extending an expiring license only when the new license applied for is "of the same type or class" as the expiring license. The appellees then examine the two licenses involved in this case, and on the basis of criteria which they alone establish, they conclude that the licenses are not "of the same type and class" and therefore are not within the scope of section 9(b).

The logic by which the appellees have reached these results is both strained and unnatural. Their conclusion that section 9(b) must be construed as if it were written in the language of the Ohio statute completely ignores the fact that Congress, having before it the precise language of the Ohio Statute, deliberately chose to draft section 9(b) using quite different language. The reasonable and natural inference to be drawn from this difference in the language used is that Congress intended section 9(b) to accomplish a result somewhat different from that of the Ohio statute rather than the identical result. The two statutes are unquestionably "similar", as the Senate Committee stated, but similarity and identity are not one and the same. The Ohio statute is addressed to the *form* of the licenses involved and imposes a condition that an existing license will be extended only if the license applied for is "of the same type or class"; section 9(b) on the other hand, looks not to the form of the licenses but to the *activity* to which they apply, and

the condition imposed by section 9(b) is not that the licenses must be of the same class and type but that they must apply to the same *activity*, which must be an activity of a *continuing* nature. If, as we suggest, these differences in the language of the two statutes are the result of deliberate action on the part of Congress, and there is no reason to believe otherwise, then the clear and obvious intent of the plain language of section 9(b) is that an existing license applicable to an activity of a continuing nature will be perpetuated until the application for a new license to continue that activity has been acted upon by the Agency, irrespective of whether the forms and durations of those licenses are the same or different.

B. Even Assuming, Arguendo, That Section 9(b) Was Intended by Congress to be Interpreted as if It Contained the Wording of the Ohio Statute, It Does Not Follow That the Licenses Involved in This Case Are Not "of the Same Type or Class" Within the meaning of the Ohio Statute

The appellees contend that a "temporary license" is not of the same type or class as a "permanent licensed," and, therefore, section 9(b) construed in the light of the Ohio statute, cannot have been intended to apply to such licenses even though they may be applicable to the same continuing activity. The legislative history of section 9(b) appears to deny the validity of appellees' contention. The Congressional Committee expressly considered whether both temporary and permanent licenses were within the scope of section 9(b). As quoted at pages 13 and 14 of our opening brief, the Committees of both Houses pointed out in their reports that the *second* sentence of section 9(b) was not intended to apply to temporary licenses; and the Attorney General, in his

comments on section 9(b), requested by those Committees, specifically adverted to a situation such as presented in this case, where a temporary license would be issued pending the determination of an application for a permanent license. He also stated that the *second* sentence of section 9(b) would not apply to such a situation. Both Committees and the Attorney General, by these comments, were making clear the fact that a temporary license, effective during the pendency of a permanent license application applicable to the same continuing activity, could be terminated forthwith by the agency at the conclusion of the proceeding for the permanent license, without the necessity of following the revocation procedure provided for in the second sentence of section 9(b). Congress did not, however, negative the application of the first sentence of section 9(b) to temporary licenses; and we therefore presume that Congress intended that an applicant for a temporary license, as well as an applicant for a permanent one, is entitled to have his application heard with reasonable dispatch, as required by the first sentence. Likewise, Congress did not negative the application of the third sentence of section 9(b) to expiring temporary licenses applicable to activities of a continuing nature; and we believe that, under a logically consistent interpretation of the entire section, Congress intended that an expiring temporary license would be extended while a proceeding for a new license applicable to the same continuing activity is pending, irrespective of whether the proposed new license is to be a temporary or permanent one.

Even apart from the foregoing legislative history indicating a Congressional intent to cover both tem-

porary and permanent licenses under the third sentence of section 9(b), and still continuing with our assumption, *arguendo,* that Congress did intend section 9(b) to apply only to situations where the expiring license and the requested license are "of the same type or class", as those words were used in the Ohio statute, it does not necessarily or even reasonably follow, as appellees suggest, that section 9(b) would not apply in this case.

Nothing in the record of this case, nor in the legislative history of section 9(b), discloses what the Ohio legislature intended by the words "license of the same type or class". The appellees base their entire argument concerning this point on what they regard as a possible basis that could have been used in Ohio in construing these words. The appellees in their briefs suggest the following items as bases for distinguishing between "types" or "classes" of licenses: (1) the duration of the license, i.e., whether permanent or for a fixed period; (b) the nature of the proceeding by which the licenses are issued, i.e., whether pursuant to adversary public hearing procedure or pursuant to application, written representations, and agency action; and (c) the findings which must be made as a prerequisite to the issuance of the licenses, i.e., whether required by the public convenience and necessity, or the public interest, or some other criteria.

These bases of distinction suggested by the appellees are, of course, highly esoteric, and would not ordinarily come to mind when reading the words "license of the same type or class". Appellees have failed to mention the one obvious basis for establishing whether licenses are of the "same type of class", which basis quite likely could have been the actual

intent of the Ohio legislature, namely, the activities for which the licenses are issued. The Ohio statute is concerned with a license applicable to a "business or profession" and provides that the license applicable to that "business or profession" shall not expire while an application for a "new license of the same type or class" is pending. We believe the obvious and sensible interpretation of the words "license of the same type or class" would be "license applicable to the same type or class of business or profession". For example, a dentist's license will not expire while his applica- for a new dental license is pending; but if his new license application is for the practice of medicine the expiring dental license would not be perpetuated in the interim. Or if a man held a license to operate as a drugstore and desired to convert his place of business into a restaurant, the expiration of the drug store license would not be postponed pending determination of his application for a restaurant license.

The appellee-railroads point out at page 10 of their brief that the Ohio statute in question was amended in 1945, only two years after its enactment. The ambiguous words "license of the same type or class" were deleted, and the new wording now refers simply to "licensed business or profession", which amendment is consistent with the interpretation we suggest here.

If Congress did intent that section 9(b) follow the meaning of the Ohio statute, then under the interpretation we suggest, the permanent license for which Pan-Atlantic applied is "of the same type" as Pan-Atlantic's temporary license, since both cover the same business operation—common carrier water transportation service between ports on the east and west

coasts of the United States via the Panama Canal; and section 9(b) would therefore be applicable to this case.

II. THE CONSTRUCTION OF SECTION 9(b) ADVOCATED BY APPELLANTS IS CONSISTENT WITH THE BASIC LEGISLATIVE PURPOSE UNDERLYING THE INTERSTATE COMMERCE ACT

The Department of Justice argues that the application of the third sentence of section 9(b) to temporary licenses issued under section 311(a) would defeat the legislative purpose of the certificate provisions of the Act. The Department of Justice argues that the certificate provisions are intended to prevent an oversupply of transporation and to afford protection to existing certificate holders through hearing requirements and standards of public convenience and necessity, which must be met before a new licensee may commence operation. The Department insists that temporary licenses are issued ex parte and without the necessity of establishing that service is required by the public convenience and necessity, thus jeopardizing the rights of existing license holders.

While it is quite true that the certificate provisions of the Act are intended to prevent an over-supply of transportation services to the detriment of the national transportation system, and the due process provisions of the Act are designed to protect existing license holders, it is our position that the temporary licenses issued pursuant to sections 210a and 311(a) of the Act are not in derogation of these statutory purposes, and, furthermore, such temporary licenses are issued in response to other and even more fundamental legislative purposes stated in the Act.

The National Transportation Policy (49 U.S.C. prec-sec. 1) declares that the entire regulatory scheme provided by the Interstate Commerce Act has been established, and must be interpreted and applied, with the following objectives in mind:

> ". . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."

Consistent with this declaration of Congressional policy, the Commission has the duty of providing an adequate supply of all types of transportation services, sufficient to meet the needs of the shipping public. Under ordinary condition , the regulatory scheme provides for the issuance of certificates authorizing the performance of transportation services; and such certificates are issued pursuant to procedural due process requirements which include notice to existing license holders of the pending application and an opportunity for such license holders to express their views to the Commission with respect thereto. In addition, the applicants are usually required to establish that the public convenience and necessity require the proposed service. Congress, however, also has recognized the fact that, under certain circumstances, an immediate and urgent need for transportation services required by the public may arise where there is no licensed carrier available to render such service. The temporary licensing provisions in sections 210a and 311(a) of the Act were established by Congress for the express purpose of affording the Commission a means of promptly filling such public

needs. While it is true that the temporary licenses are issued without a public hearing, the Department of Justice errs in stating that the proceeding is ex parte, and that there are no safeguards for existing license holders. The proceedings are not ex parte. Before acting upon an application for a temporary license, the Commission provides notice to licensed carriers of such pending application, and it affords such licensed carriers an opportunity to present their views with respect to the application. In this case, the railroad appellees received such notice of the application of Pan-Atlantic for a temporary license and they did submit their views to the Commission with respect thereto prior to any action being taken by the Commission. Moreover, the temporary licensing provisions of the Act, section 210a and 311(a), actually demand that the applicant meet a higher substantive standard of proof than is required to obtain a certificate. The temporary licensing requirement is that the applicant must establish "an immediate and urgent need to a point or points, or within a territory, having no carrier service capable of meeting such need"; the certificate requirements are only that the applicant must establish that the proposed service "is or will be required by a present or future public convenience or necessity" (sec. 309). Thus, existing licensed carriers actually receive greater safeguards under the temporary licensing requirements than they do under the certificate requirements.

The basic issue raised by this case is whether the shipping public, in response to whose urgent and immediate needs the temporary service was established, should be deprived of that service at the end of 180 days, simply because the administrative agency has

not yet completed the proceeding which will determine whether the carrier providing that service may continue to do so under a new license. The appellees argue that Congress was willing to entrust the temporary licensing powers to the Commission only for a period of 180 days, and beyond that time the paramount consideration is protection of existing license holders rather than continuance of a needed public service. In our opinion, this argument is completely without merit. If at the beginning of the 180 day period no existing licensed carrier was capable of providing the urgently needed service, it is difficult to see how, at the end of the 180 day period, any such licensed carrier can claim that a continuation of that service under the temporary license until completion of the pending certificate proceeding will cause such carrier a serious injury because of diversion of traffic from it. In balancing the respective interests involved in this case, certainly the injury to the public of discontinuing the needed water carrier service, together with the injury to Pan-Atlantic resulting from suspension of that service until completion of the pending certificate proceeding, greatly outweigh any injury the protesting rail carriers might sustain as the result of the alleged possible diversion of traffic from such rail carriers during the pendency of that certificate proceeding. This is the type of problem that Congress was considering when it enacted section 9(b) of the Administrative Procedure Act, and there probably is no situation in more critical need of relief offered by section 9(b) than that presented in the instant case. It is hard to conceive that Congress intended to make the temporary licensing provisions of the Interstate Commerce Commission completely exempt from the operation of section 9(b), when the

Commission is well-known to be one of the most active of the Federal licensing agencies, and when Congress expressly stated that it was *not* making any exceptions under the Administrative Procedure Act for the Commission (see quotations pp. 33-35 of our opening brief).

III. APPELLEES ERR IN CERTAIN OF THEIR FACTUAL ASSERTIONS

A. The Appellee-Railroads Err in Asserting That All of the Present Temporary Operation Is Not Covered by the Application for the New Permanent License

At pages 26 and 27 of appellee-railroads' brief, a point is made that Miami as a port of destination is contained within the scope of the temporary authority but not within the scope of the application for permanent authority. This is erroneous. The permanent license application before the Commission does include Miami as a port of origin and destination. Appellees, in their original complaint in this case inadvertently omitted Miami in the list of many cities covered by the application. Pan-Atlantic, in its answer did not catch this error; and appellees, in their zealous efforts to create distinctions where none in fact exist have brought forward this typographical error which originated in their complaint. Their entire point is without any validity.

The appellees also suggest as a reason for not applying section 9(b) to Pan-Atlantic's temporary license, the fact that the application for a permanent license is broader in scope than the temporary license. The entire activity being performed under the temporary license will be continued under the permanent license, hence the temporary license does apply to a continuing activity, which is all that is required by section 9(b). Appellees suggest that, if section 9(b) is con-

strued by this Court as being applicable to temporary licenses issued by the Interstate Commerce Act, abuses can occur if applicants apply for new licenses far more extensive than the temporary licenses which they hold. This is a matter which is wholly within the control of the Commission both as to its dockets and its rule-making procedures.

B. The Appellees Err in Asserting That the Commission's Rules Are Inconsistent With the Commission's Construction of Section 9(b)

The appellee-railroads assert at page 37 of their brief that the Commission's rule preserving to the Commission the right to terminate at any time, "in accordance with law", any temporary authority or extension thereof under section 9(b) is inconsistent with our suggested interpretation of section 9(b). With this we do not agree. There are lawful occasions when the Commission may cancel a temporary authority extended by operation of law under section 9(b). Examples of such situations would be (a) where the licensee discontinues operations voluntarily, so that the operation no longer is one of a continuing nature; (b) where the licensee withdraws or discontinues prosecution of the application for a new license; and (c) where the licensee engages in wilful violations of the Act.

C. The Department of Justice Errs in Contending That 180 Days Is an Adequate Period Within Which the Commission Can Complete License Application Proceedings

The short and simple answer to this contention is that the very steps of procedural due process, which the Department has enumerated as being available to existing license holders in certificated proceedings, are precisely the reason why a certificate proceeding

cannot today be completed within 180 days, unless the application is uncontested. Protesting carriers, such as the railroads in this proceeding, may under the Commission's procedural rules use up approximately 160 days of the total 180 days solely on their own behalf. Obviously the Commission, the Examiner, and the applicant cannot complete their functions in only 20 days. The crowded docket of the Commission is itself the demonstration that the protestants and interveners, as well as the applicants, cannot complete certificate proceedings today in 180 days. Congress itself realized this fact in 1946, and that is why section 9(b) was enacted.

WHEREFORE, the appellant, Pan-Atlantic Steamship Corporation, respectfully prays that this Court reverse the judgment of the District Court and remand this case to the District Court with instructions to enter judgment for the appellant.

Respectfully submitted,

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April 22, 1957

Proof of Service

I, Russell S. Bernhard, one of the attorneys for Pan-Atlantic Steamship Corporation, appellant herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 22nd day of April, 1957, I served copies of the foregoing document on the counsel for the several parties to this proceeding, by mailing a copy in a duly addressed envelope, by air mail, postage prepaid, to each of the following outside Washington, D. C., and by first-class mail, postage prepaid, to each of the following in Washington, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 408

PAN ATLANTIC STEAMSHIP CORPORATION, APPELLANT

v.

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.

No. 424

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the three-judge United States Court for the District of Massachusetts (R. 30–31) is reported at 144 F. Supp. 53. The concurring statement of Judges Wyzanski and Ford appears on page 54. The opinion of the United States District Court for the District of Massachusetts in *Stone's Express, Inc.* v. *United States*, held by the District Court to be

controlling in this case, is reported at 122 F. Supp. 955. No opinion, other than the findings in its order, was entered in this matter by the Commission. A copy of this order of October 28, 1955, which is in issue, is attached hereto as appendix A.

JURISDICTION

The jurisdiction of the Court upon appeal rests on 28 U. S. C. 1253 and 2325. The Commission is appealing as an intervening defendant pursuant to 28 U. S. C. 2323 and 2101 (b).

The final judgment of the District Court was entered on May 25, 1956 (R. 32–33). Notice of Appeal by the Commission was filed in the District Court July 17, 1956 (R. 37). Probable jurisdiction as to the Commission's appeal was noted November 19, 1956.

STATUTES AND REGULATIONS INVOLVED

Section 311 (a) of the Interstate Commerce Act (49 U. S. C. 911 (a)):

> To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier by water or a contract carrier by water, as the case may be. Such temporary authority shall be valid for such time as the Commission shall specify but not for more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

Section 2 (e) of the Administrative Procedure Act (5 U. S. C. 1001 (e)):

> (e) *License and Licensing.*—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.

Section 9 of the Administrative Procedure Act (5 U. S. C. 1008):

> SEC. 9. In the exercise of any power or authority—
>
> (a) *In General.*—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.
>
> (b) *Licenses.*—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulnes or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee

> by the agency in writing and the license shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements: *In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.* [Emphasis added.]

Regulations prescribed by the Commission governing the extension under the last sentence of section 9 (b) of the Administrative Procedure Act of water carrier temporary operating authorities issued under section 311 (a) of the Interstate Commerce Act are published in the Code of Federal Regulations, Title 49, Part 2, sections 2.1–2.4 and are set forth in appendix B.

QUESTION PRESENTED

Whether the last sentence of section 9 (b) of the Administrative Procedure Act extended or authorized the Commission to extend beyond 180 days, and until the determination of the certificate application, a temporary authority issued to Pan-Atlantic Steamship Corporation under section 311 (a) of the Interstate Commerce Act authorizing operations as a common carrier by water, where the common carrier operation is of a continuing nature and Pan-Atlantic had filed a timely and sufficient application for a certificate of public convenience and necessity to continue the same operations conducted under the temporary authority, which application had not been determined by the

Commission upon the expiration of the 180 days of temporary authority.

STATEMENT OF THE CASE

The Commission, upon finding an immediate and urgent need for the service, by order dated May 18, 1955, issued to Pan-Atlantic Steamship Corporation, under authority of section 311 (a) of the Interstate Commerce Act, temporary authority to engage in operations in interstate and foreign commerce, as a common carrier by water, between various ports of the United States, for a period of 180 days, to expire on November 14, 1955 (R. 9–10). Pan-Atlantic, on or about May 5, 1955, had filed with the Commission under section 309 (e) of the Interstate Commerce Act (49 U. S. C. 909 (e)) an application for a permanent certificate of public convenience and necessity to engage in common carrier operations which included those authorized by the temporary authority (R. 4–5). The Commission was unable to conclude the proceedings on the application for a certificate of public convenience and necessity before the expiration of the temporary authority (R. 11, 14). Accordingly, Division 4 of the Commission, by order dated October 28, 1955, authorized Pan-Atlantic to continue to perform the water carrier service authorized by the temporary authority until the further order of the Commission, but not beyond the time the application for a permanent certificate of public convenience and necessity had been finally determined (R. 14–15). A petition by the appellees for reconsideration by the entire Commission of this order of Division 4 was

denied by order of the Commission dated January 9, 1956 (R. 18).

The Commission, in authorizing Pan-Atlantic to continue beyond 180 days, the same operations authorized by the temporary authority, determined that the operation was of a continuing nature and that Pan-Atlantic had filed a sufficient and timely application, within the meaning of section 9 (b) of the Administrative Procedure Act (R. 14–15). Accordingly, the Commission concluded that it was authorized and required by the last sentence of section 9 (b) of the Administrative Procedure Act to permit the continuance of the operations established under the temporary authority until the pending application for permanent authority had been finally determined.

Appellees instituted this action in the United States District Court to vacate, annul, and set aside the Commission's order of October 28, 1955, which authorized the continuance of operations by Pan-Atlantic pending the conclusion of the proceedings on the application for a certificate of public convenience and necessity. Appellees intended that this order of October 28, 1955, was not authorized by section 9 (b) of the Administrative Procedure Act or any other provision of law (R. 7).

The District Court held that the case was ruled, in principle, by the prior decision of that court in *Stone's Express, Inc.* v. *United States,* 122 F. Supp. 955 (1954), and that "with the usual deference to precedent common in this court" it would adhere to the conclusion reached in that case. In a concurring statement, two of the three judges constituting the

District Court stated that were they not, as they conceived it, bound by the prior ruling in the *Stone's Express* case, *supra,* they would conclude that "by virtue of § 9 (b) of the Administrative Procedure Act, 60 Stat. 242, the Interstate Commerce Commission did not act *ultra vires* in entering its order of October 28, 1955." One of the judges joining in this concurring statement had participated in and approved the conclusion in the *Stone's Express* case, *supra.* (R. 30–31.)

In *Stone's Express, Inc.* v. *United States, supra,* the District Court held that section 9 (b) of the Administrative Procedure Act did not authorize the Commission to extend a similar, but not identical, temporary authority (issued under section 210a (b) of the Interstate Commerce Act (49 U. S. C. 310a (b)) beyond the 180-day limit upon such grants stated in section 210a (b). An appeal from that decision was taken to this Court, which noted probable jurisdiction. *Interstate Commerce Commission* v. *Stone's Express, Inc.,* 348 U. S. 886. That appeal became moot before it was decided by this Court, by the final determination of the permanent authority application by the Commission. Upon stipulation of the parties, the case was remanded to the District Court for dismissal as moot. 350 U. S. 906.

SUMMARY OF ARGUMENT

Admittedly, the Commission, acting solely under the authority of section 311 (a), may not authorize operations for a longer period than 180 days. It is

our position, however, that the 180-day limitation in section 311 (a) is merely a limitation upon the power of the Commission when acting under section 311 (a) and that it does not limit or impair the power of the Commission to authorize other or further operations where authority to do so is conferred by other provisions of law, i. e., that this limitation does not prevent the Commission from exercising any authority that may be conferred upon it by other statutes such as section 9 (b) of the Administrative Procedure Act. It is further the view of the Commission that section 9 (b) clearly authorizes and requires it to allow continuances of operations (including those established under temporary authority issued under section 311 (a)) wherever the facts specified in the last sentence of section 9 (b) exist. We contend that there is no conflict between the 180-day limitation in section 311 (a) and the requirements of the third sentence of section 9 (b), but should the court perceive such a conflict, that conflict should be resolved in accordance with the obvious intent of the two provisions by giving effect to the 180-day limitation except in the specific instances within the scope of the section 9 (b) provisions, and in such instances, give effect to the clearly expressed intent of that provision to protect licenses in the specified circumstances.

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ARGUMENT

I. Section 9 (b) of the Administrative Procedure Act empowers the Commission to issue a temporary water carrier authority during the pendency of an application for a permanent certificate of public convenience and necessity, without regard to the 180 day limitation in Section 311 (a) of the Interstate Commerce Act

A. Section 311 (a) empowers the Commission to authorize urgently needed water carrier service pending the determination of an application for a certificate of public convenience and necessity

Section 311 (a) of the Interstate Commerce Act (49 U. S. C. 911 (a)) became law on September 18, 1940, as a part of the Water Carrier Act, Part III of the Interstate Commerce Act (49 U. S. C., Chapter 12). It is similar to and was patterned after section 210a (a) of Part II of the Interstate Commerce Act (49 U. S. C. 311a (a)) applicable to motor carriers. The purpose of section 311 was stated in the Report of the House Committee on Interstate and Foreign Commerce on the Transportation Act of 1939 (House Report 1217, 76th Congress, 1st Session), as follows:

> This section permits the Commission to authorize temporary operations by water carriers to meet immediate and urgent needs, and in cases where delays occur in connection with the determination of applications for consolidations and mergers. It is comparable to section 210a of part II.

No provisions for the grant of temporary operating authority were included in the Motor Carrier Act, 1935 (49 U. S. C., Chapter 8). It was soon discovered, however, that this omission was a serious deficiency in the statute. Situations arose in which

there was an immediate and urgent need for service which the existing carriers were unable to provide. The Commission was unable to authorize immediate service because of the procedures required for the issuance of permanent certificates and permits. The matter was brought to the attention of Congress and in 1938 section 210a was added to the Motor Carrier Act. The Commission, in its letter of February 28, 1938, to the Senate and House of Representatives (Senate Document 154, 75th Congress, 3d Session) explained the need as follows:

TEMPORARY GRANTS OF AUTHORITY

> As the act now stands, it is necessary, before new operations of a motor carrier can be undertaken, to obtain from the Commission a certificate of public convenience and necessity, if the proposed operations are those of a common carrier, or a permit, if they are those of a contract carrier. The act provides, also, that before we grant such a certificate to a common carrier, proof that the contemplated operations are required by the present or future public convenience and necessity must be presented, and somewhat similar proof must be presented before we can grant such a permit to a contract carrier.
>
> Some considerable time is necessarily required for the procedure entailed by a public hearing and decision of the issues there presented. The act now contains no provision enabling us speedily to grant temporary operating authority to meet an emergency, pending such formal determination of the matter. We

believe that we should have power to make such temporary grants.

* * * * *

Because of this experience in the regulation of motor carriers, when the bill providing for the regulation of water carriers was enacted in 1940, a provision similar to that in section 210a was included as section 311 (a). In each instance, the objective was the same, to provide, in the public interest, for service where there existed an immediate and urgent need which could not be supplied by the existing carriers. Service is authorized under these provisions (1) where the need will exist for only a short period of time (for even a single cargo or a single truckload) or (2) to allow service urgently needed by the public pending the determination of an application for a permanent certificate of public convenience and necessity. Where the evidence indicates an immediate and urgent need for a definite period which is less than 180 days, the Commission grants temporary authority for the period of the need and the operation is not regarded as of a continuing nature beyond that period, within the meaning of section 9 (b). Where it appears that the need will continue for an indefinite time, at least beyond 180 days, temporary authority is granted for the maximum period of 180 days. At the end of that period, if a sufficient and timely application for a certificate of public convenience and necessity has been filed and has not been determined, the Commission will consider whether the need continues and, if so, authorize the continu-

ance of the operation until the conclusion of the application for a certificate. 49 C. F. R. 2. 1–2.4. This interpretation is similar to the interpretation of section 9 (b) by the Civil Aeronautics Board. 14 C. F. R., part 290.

Where there is an immediate need for service, an applicant may file, simultaneously an application for a permanent certificate of public convenience and necessity and an application for temporary authority. In other circumstances, the application for a certificate may be filed either prior or subsequent to the filing of an application for, or the granting of, temporary authority. There is no requirement in section 311 (a) that either shall be filed before the other.

In *Kansas City & Leavenworth Transp. Co.* v. *United States*, 51 F. Supp. 916, 920, the three-judge District Court commented on the meaning and purpose of section 210a (a) in the words quoted below. Because of the similarity between that section and section 311 (a), the remarks are equally applicable to the latter section:

> Second, we think that section 210a (a) must be considered in the light of section 207 (a). Under the latter section applications for certificates of authority are based on "present and future" public convenience and necessity. There is no requirement of proof of permanent public convenience and necessity. Considering the two sections and what each was designed to accomplish, we think Congress, in its experience, saw that public convenience and necessity would at times become so urgent as to require transportation facilities without waiting for

hearing and decision under section 207 (a). Accordingly, it enacted section 210a (a), which provides for the issuance of a certificate for immediate need. Such immediate necessity is designed to cover that period which may elapse before the Commission issues a certificate under section 207 (a).

At the time section 210a was enacted, it was thought that a period of 180 days would be a sufficient time within which to determine applications for certificates and permits. The same thought was followed when section 311 was enacted. It developed, however, that some proceedings could not be determined within that time, particularly contested applications involving extensive operations, of which the present application of Pan-Atlantic may be cited as an example. The situation was relieved by the Second War Powers Act, 1942, which, effective March 27, 1942, amended sections 210a (a) and 311 (a) by striking out the words, "but not for more than an aggregate of one hundred and eighty days." By the terms of this Act these amendments were to remain in effect only until December 31, 1944, on which date they were to cease to be in force and any statutory provisions amended thereby were to be in full force and effect as though the Act had not been enacted (56 Stat. 176, 187). This amendment was extended by the amendment to the Second War Powers Act of December 20, 1944, and was further extended by the amendment of June 29, 1946, which provided that these amendments shall remain in effect until March 31, 1947 (50, App. U. S. C. 645; 60 Stat. 345). On the last mentioned

date, the clauses limiting grants to 180 days again became a part of sections 311 (a) and 210a (a).

Before this amendment to section 311 (a) by the extension of the Second War Powers Act expired on March 31, 1947, the Administrative Procedure Act, including section 9 (b), had been enacted on June 11, 1946, and section 9 (b) had become effective 90 days thereafter, September 9, 1946 (5 U. S. C. 1008 and 1011). The Commission has extended many temporary authorities issued under sections 210a (a) and 311 (a) under the authority of section 9 (b) of the Administrative Procedure Act, but only in those instances in which the facts satisfied the conditions stated in the third sentence of that subsection.

The question of allowing the continuance of operations pending the judicial review of decisions of the Commission, where the carrier has been operating under a temporary authority, also is involved. The combined time required for the Commission proceeding on an application for a certificate and the time required by the courts for the judicial review of such a decision almost inevitably will exceed the 180 days of operation allowed by section 311 (a). The courts have no authority to issue certificates or temporary authorities (United States v. Carolina Carrier Corporation, 315 U. S. 475, 489–490) and unless authority for such continuance exists under section 9 (b), the operation must discontinue at the end of 180 days regardless of a pending judicial review proceeding.

The Commission exerts every effort to determine all applications for certificates and permits within

the shortest possible time. Despite these efforts, a large number (but small in terms of percentages) cannot be determined within the period of 180 days of temporary authority. To require the applicants in such cases to discontinue the operations conducted under the temporary authority until the application for permanent authority can be determined, often would be serious or even disastrous to the carrier, but more important it would require the discontinuance of service to shippers for which the Commission has found that there is an immediate and urgent need which cannot be satisfied by other existing carriers. Such a result would be contrary to the purpose and intent of the Interstate Commerce Act which is, as stated in the Congressionally declared National Transportation Policy (49 U. S. C. preceding § 1), to provide transportation adequate to meet the needs of the commerce of the United States, of the Postal Service, and national defense.

B. Section 9 (b) of the Administrative Procedure Act protects licensed activities of a continuing nature from interruptions arising out of the determination of applications for new licenses

The comprehensive language of the definition of "license" and "licensing" in section 2 (e) of the Administrative Procedure Act makes clear that every form and character of permission required by law to engage in any activity, or even to perform single acts, was intended to be included. The definition of "license" is quoted for convenience:

SEC. 2. As used in this Act—

* * * * *

(e) LICENSE AND LICENSING.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.

* * * * *

There is no indication in section 2 (e) or elsewhere in the Administrative Procedure Act that this definition does not include temporary operating authorities of the character authorized by section 311 (a) of the Interstate Commerce Act. The plain words of the definition inevitably lead to the conclusion that these temporary authorities are "licenses" within the definition in section 2 (e).

In the third sentence of section 9 (b) of the Administrative Procedure Act the word "license" is used without any explanation, definition, or qualification, and, therefore, must be taken to have the meaning given in the definition in section 2 (e). Temporary authorities issued under section 311 (a) are term licenses with expiration dates, such as seems to have been contemplated by the words, "No license * * * shall expire", used in section 9 (b).

The language of section 9 (b), "no license * * * shall expire" shows that Congress was intentionally dealing with licenses which because of a limitation as to time otherwise would expire on a fixed date. There is nothing in the language of the provision or in the legislative history which indicates that Congress did not intend this protection to licensees to be effective where a limitation upon the term of a grant was

specified in a statute such as section 311 (a). It will be noted that the discretionary withdrawal of licenses by the agencies was dealt with in the second sentence of section 9 (b). On the other hand, the language in the statute and the legislative history indicates a resolute intent that licensees shall be protected in the situations described in the statute, regardless of limitations in individual statutes or in regulations.

This intent was shown early in the consideration of the Administrative Procedure Bill by the following statement in the Senate Judiciary Committee Print, June 1945 (Legis. His. A. P. A.,[1] p. 35):

> This subsection is designed to ameliorate the difficulties where private parties are required to secure licenses. The first sentence requires that applications be determined promptly. The second sentence is designed to preclude the withdrawal of licenses, except in cases of wilfulness or the stated cases of urgency, without affording the licensee an opportunity for the correction of conduct questioned by the agency. Similar provisions are now contained in the banking statutes, except that the latter provide in addition that stated periods of time—sometimes more than one period of warning—shall elapse prior to the revocation of the equivalent of licenses [citation of statutes]. *The third sentence automatically extends a license in any case in which the licensee has made timely application for renewal but the granting agency fails to act prior to the expiration of the exist-*

[1] Legislative History, Administrative Procedure Act, Senate Document 248 of the 79th Congress, 2d Session. This document will hereinafter be cited as "Legis. His. A. P. A."

ing license. A similar provision is contained in the licensing procedure act of the State of Ohio (Act of June 3, 1943, sec. 1 amending secs. 154–167 of the General Code: Amended substitute Senate Bill No. 36). [Emphasis added.]

Senator McCarran, in explaining the Administrative Procedure Bill to the Senate, stated concerning section 9 (b):

> In businesses of a continuing nature, no license is to expire until timely applications for new licenses or renewals are determined by the agency (Legis. His. A. P. A., p. 323).

Representative Walter, in explaining the Administrative Procedure Bill to the House of Representatives, commented on section 9 (b) in the following words:

> Section 9 (b) deals with licensing. It requires agencies to determine promptly all applications for licenses, prohibits them from withdrawing a license without first giving the licensee notice and an opportunity to achieve compliance except in cases of obvious wilfulness or emergency, *and in a business of a continuing nature precludes any license from expiring until timely applications for new licenses or renewals have been determined.*
>
> These special provisions are necessary because of the very severe consequences of the conferring of licensing authority upon administrtive agencies. The burden is upon private parties to apply for licenses or renewals. *If agencies are dilatory in either kind of application, parties are subjected to irreparable injuries unless safeguards are provided.* The purpose of this section is to remove the threat

> of disastrous, arbitrary, and irremediable administrative action (Legis. His. A. P. A., p. 368). [Emphasis added.]

That the Administrative Procedure Act was intended to supersede existing law and limitations to the extent necessary to enable agencies to comply with its requirements is made clear by section 12, which states:

> Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise.

It is submitted that the language of section 9 (b) that, "no license * * * shall expire," is either a self operating provision which automatically extends licenses in the circumstances specified, or it is a grant of authority to the agency and a command that it make effective the requirement.

It is the view of the Commission that the last sentence of section 9 (b) is a command directed to the agencies. The operations must be of a continuing nature, there must have been filed a timely and sufficient application to continue the same operation, and the application for the new or extended license must not have been finally determined. These are matters which the administrative agency is specially qualified to determine. Also, for purposes of the general administration of the Interstate Commerce Act it is necessary that the Commission know, and have established of record, what carriers are entitled to engage in operations subject to its jurisdiction. This does not mean that the Commission has discretion to deny the benefits of section 9 (b) where the facts stated

as a requisite in that section are found to exist. It is the orderly procedure for determining the issues involved, subject to judicial review as provided by law.

C. When licensed activities are of "a continuing nature", Section 9 (b) supersedes the 180 day limitation of Section 311 (a)

It is our contention that there is no conflict between the 180-day limitation in section 311 (a) of the Interstate Commerce Act and the last sentence of section 9 (b) of the Administrative Procedure Act. The limitation in section 311 (a) is stated in the following words:

> Such temporary authority shall be valid for such time as the Commission shall specify but not for more than an aggregate of one hundred and eighty days, * * *.

The policy under parts I, II, III and IV of the Interstate Commerce Act always has been to provide, generally, for the issuance of certificates of unlimited duration and thereby encourage investments in transportation enterprises by offering protection against the possible loss of operating rights which might occur if certificates were required to be renewed at periodic intervals. It was natural, therefore, that when it became necessary to add temporary authority provisions to meet immediate and urgent needs there would be a limitation upon the time for which temporary authorities may be issued in order to prevent a general evasion of the certificate requirements through the use of the temporary authority provisions. As previously pointed out, it was found that the exigencies of litigation prevented some certificate application proceedings from being concluded within the specified 180

days. In such instances, it would be necessary for the carrier furnishing the service under a temporary authority to discontinue at the end of 180 days, leaving the public without service unless some other person applied for and obtained temporary authority to furnish service. The original operator, if successful in his application proceeding, would resume operations upon the conclusion of the application proceeding. Relief in such situations was afforded by the Second War Powers Act, effective March 27, 1942, which removed the limitation from the temporary authority provisions until after the Administrative Procedure Act became law.

This time limitation in section 311 (a) does not in any way impair or affect the authority or jurisdiction of the Commission to take any action or to allow any operation where authority therefor is contained in another provision of the Interstate Commerce Act or in another statute such as section 9 (b) of the Administrative Procedure Act. The Commission, obviously, is not prevented from issuing a certificate under other provisions of the Interstate Commerce Act which allows the applicant to continue after 180 days the same operations it was conducting under a temporary authority. For the same reason, permission to continue operations beyond 180 days, pursuant to section 9 (b) of the Administrative Procedure Act, is not a violation of the limitation in the temporary authority provision. There is no violation nor any conflict between these provisions because each permission is authorized by a different provision of law and for different reasons. Under the temporary authority

provisions of the Interstate Commerce Act, the primary objective is to serve a public need for transportation. The purpose of section 9 (b) of the Administrative Procedure Act is to protect a person engaged in a licensed undertaking from the damage that it may suffer from being compelled to discontinue a business of a continuing nature, only to resume it after the administrative proceeding is concluded. Congress determined by the Administrative Procedure Act to give that degree of protection to persons compelled to obtain licenses to engage in a business. The effect of this Administrative Procedure Act provision coincides with the objectives of the Interstate Commerce Act.

If, contrary to our contentions, the court should perceive a conflict between these statutory provisions, it is submitted that the conflict should be resolved by giving effect to the provisions of the Administrative Procedure Act in those situations in which it was intended to apply because it is the latest conceived and expressed intent and because it is a more specific and limited statute applying to specifically defined and limited situations. In this connection section 12 of the Administrative Procedure Act (5 U. S. C. 1011) provides:

> Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly.

It thus, in substance, says that it supersedes all statutes in conflict therewith to the extent necessary to comply with its requirements and that no future statute shall be construed to repeal its provisions by implication. This court, in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, after discussing the circumstances which led to the enactment of the Administrative Procedure Act, stated, at pages 40–41:

> Experience may reveal defects. But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear.

Other similar statements discussing the Construction of the Administrative Procedure Act in connection with other statutes appear in *Marcello* v. *Bonds,* 349 U. S. 302, 310; *Shaughnessy* v. *Pedreiro,* 349 U. S. 48. 51; and *Marine Engineers' Beneficial Assn. No. 13* v. *N. L. R. B.,* 202 F. 2d 546, C. C. A. 3d (1953) (Certiorari denied, 346 U. S. 819).

Other interested parties who may object to the continuance of such operations in this way are entitled to their remedies under the law if any such application proceeding is unlawfully delayed. The first sentence of section 9 (b) states:

> In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted

> pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision.

Section 10 (e) of the Administrative Procedure Act states:

> It [the reviewing court] shall (A) compel agency action unlawfully withheld or unreasonably delayed; * * *.

In *Stone's Express, Inc.* v. *United States, et al.*, 122 F. Supp. 955, relied upon by the court below, the court interpreted the language of section 9 (b) of the Administrative Procedure Act as requiring that the applicant for an extension of a license or for a new license be a licensee at the time the application for an extension is filed.

We most respectfully contend that this interpretation of section 9 (b) is not warranted. We have searched the legislative history and we have found no indication of an intention to make the technical point, whether the applicant was a licensee at the time he filed the application for a new license, the determining fact as to whether the protection afforded by the third sentence of section 9 (b) shall be given or denied. The quotations from the legislative history heretofore given, in our opinion, show that the legislators had in mind and were determined to protect any licensee from having to discontinue a business because of the lapse of the license under which he was operating, if he had made a timely and sufficient application which the agency had failed to determine by the time the existing license would expire.

The court quoted from the Senate Judiciary Print of June 1945 (Legis. His. A. P. A. p. 35) the significant parts of the statement concerning the third sentence of section 9 (b), including the statement that, a "similar" provision is contained in the licensing procedure act of the state of Ohio. It then quoted the Ohio statute. We respectfully submit that while the language in the Ohio statute which the court italicized, "held by said licensee at the time said application was made" possibly may warrant the conclusion stated by the court, this language was not incorporated into section 9 (b). The statement of the Senate Committee that a "similar" provision was in an Ohio statute does not warrant the conclusion that the two statutes are, or were intended to be, "identical". If identity had been intended, presumably the same language would have been used.

We further respectfully contend that the language of the statute does not require and, in our opinion, does not warrant, the interpretation made by the court and that to express the meaning stated by the court requires the interpolation of words into the statute. The statute states:

> In any case in which the licensee has, * * * made timely and sufficient application * * *.

In order to express the meaning given by the court, the language should be:

> In any case in which the licensee [at the time he was such] has, * * * made timely and sufficient application * * *.

It appears to us that, at the most, there is an ambiguity in the language as to whether the applicant must have been a licensee at the time he filed for the

permanent or new authority. But that ambiguity, if it exists, should be resolved in the light of the context, the nature and the purpose of the provision, and not according to the existence or non-existence of a fact which it is difficult to believe the drafters of the provision would have considered relevant to the purpose of the provision. The statute speaks as of the expiration date of the license.

We submit, therefore, that the construction of section 9 (b) which we have heretofore presented is that intended by the legislators and is the correct legal construction.

The court made a further point, which we hope we have fairly summarized as follows: The opinion refers to the defendants as contending, in effect, that the third sentence of section 9 (b) repealed section 210a (b) by implication. It then says that the Supreme Court has stated that a statute will not be held to repeal a prior statute by implication unless no other reasonable construction is possible; that the intention of the legislature to repeal must be clear and manifest; that there must be a positive repugnancy between the provisions of the old and the new law. The opinion then states:

> We find no such repugnancy between the provisions of § 210a (b) and 9 (b). Section 210a (b) in clear and unambiguous terms states that the Commission may grant temporary approval for a period *not exceeding 180 days*. In holding that the third sentence of § 9 (b) does not apply to the temporary approval granted to St. Johnsbury, we are, therefore, following the well

established rule of giving effect to both statutes covering the same general subject matter. *United States* v. *Borden, supra.*

We do not contend that the third sentence of section 9 (b) repealed by implication the 180 day limitation in section 210a (b), section 210a (a) or section 311 (a). We contend that the third sentence of section 9 (b) is a new grant of authority and a new rule not in conflict with section 311 (a). If, however, there is any measure of conflict between section 9 (b) and section 311 (a), section 9 (b) must be regarded as having modified or qualified section 210a (b) and 311 (a), and all other statutes, where there arises the specific circumstances and conditions stated in section 9 (b).

We, of course, agree with the general statements that repeals by implication are not favored and that this result should not obtain if other reasonable construction is possible. We would, however, emphasize the word "reasonable." Statutes should not, of course, be distorted and their purpose frustrated in order to achieve a verbal consistency at the expense of defeating their evident purpose. It would rather be better to recognize the repugnancy, to the extent that it exists, and resolve the conflict as well as it may be done, in accordance with the objectives of the two statutes. *United States* v. *American Trucking Associations,* 310 U. S. 534, 542, et seq.

We respectfully urge that the district court also erred in failing to take note of the special nature of the Administrative Procedure Act, particularly, in

failing to give effect to the express provisions of section 12 which clearly shows the special status of this statute and the conferring of power upon agencies to do the things required by it.

We respectfully urge, for the reasons stated and on the authority of the legislative history and decisions previously cited that the *Stone's Express decision* should not have been regarded by the District Court as controlling the present case.

D. The Commission has held consistently that Section 9 (b) of the Administrative Procedure Act supersedes time limitations in the Interstate Commerce Act upon temporary authorities issued in the circumstances of this case

The Commission, early after the passage of the Administrative Procedure Act, adopted the interpretation of section 9 (b) with respect to temporary authorities issued under sections 210a (a) and 311 (a) here presented and has since consistently followed that interpretation. The first temporary authorities extended were those issued under section 210a (a) which began to expire 180 days after the expiration of the Second War Powers Act. The first orders extending temporary authorities in accordance with this interpretation were issued by Division 5 during the month of September 1947. In its Annual Report to Congress for the year 1947, page 111, the Commission brought this matter to the attention of the Congress in the following words:

> Since the expiration of the Second War Powers Act there has been a decrease in the filing of applications for temporary authority, which has been off-set by an increase in applications for permanent authority. When the

act expired March 31, 1947, temporary authorities were extended under section 210a (a) for a period of 180 days, or until September 27, 1947. We have further extended temporary authorities covered by 528 applications for corresponding permanent authority pending determination of such applications.

The Commission's Annual Report to the Congress for 1948, page 103, carried in a tabulation of the number of different kinds of applications filed by motor carriers, the following entry: "Extension of temporary authorities under section 9 (b) (5 U. S. C. 1008 (b))," listing a total of 782 for the year. The Annual Reports to Congress for subsequent years have contained similar information. On June 6, 1948, the Commission adopted and published in the Federal Register (13 F. R. 4150) rules governing the procedure for extending under section 9 (b) temporary authorities issued under sections 210a (a) and 311 (a) (Appendix B).

During the five years ending January 1, 1957, the Commission issued a total of 10,776 temporary authorities under sections 210a (a) and 311 (a), or an average of 2,055 per year. During this same period, it authorized the continuance beyond 180 days, until the determination of pending applications, 2,052 such operations, or an average of 412 per year. The operations thus authorized to be extended constituted approximately 19% of the number of temporary authorities granted. On January 1, 1957, operations were being conducted under 387 temporary authorities which, pursuant to section 9 (b), had been extended to periods in excess of 180 days.

The Civil Aeronautics Board, under section 416 of the Civil Aeronautics Act issues temporary exemptions for the operation of aircraft. These exemptions may be for a single flight, for a period of days or months, or for an indefinite period. The Board has interpreted section 9 (b) of the Administrative Procedure Act as applicable to such temporary exemptions, in a manner similar to the interpretation placed on section 9 (b) by this Commission. This is shown by its regulations governing the extension of exemptions under that provision published as Part 290, Title 14 of the Code of Federal Regulations. According to these regulations an exemption granted for a period of less than 180 days is regarded as applying to an operation not of a continuing nature and, inferentially, exemptions granted for periods of 180 days or more as applying to operations of a continuing nature. The latter would be licenses within the protection of section 9 (b) of the Administrative Procedure Act.

This long continued and consistent interpretation, not only by the Commission but also by the Civil Aeronautics Board, should be given great weight. Thus, in *United States* v. *American Trucking Associations,* 310 U. S. 534, 549, the court, in upholding the Commission's interpretation of the Motor Carrier Act, stated:

> In any case such interpretations are entitled to great weight. This is particularly true here where the interpretations involve "contemporaneous construction of a statute by men charged with the responsibility of setting its

machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." Furthermore, the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress.

CONCLUSION

The Commission's order of October 28, 1955 is valid and lawful in all respects. The judgment of the district court should be reversed and the proceeding remanded to that court with directions to dismiss the complaint.

Respectfully submitted.

ROBERT W. GINNANE,
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JAMES A. MURRAY,
Associate General Counsel,
Attorneys for Interstate Commerce Commission,
Washington 25, D. C.

FEBRUARY 1957.

APPENDIX A

ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 28th day of October, A. D. 1955

No. W–376 (Sub–No. 11)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE

No. W–376 (Sub–No. 12)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE (2)

It appearing, That by order of May 18, 1955, the Commission, division 4, granted Pan-Atlantic Steamship Corporation temporary authority to operate as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation (1) of passengers and commodities generally (a) from Philadelphia, Pa., Baltimore, Md., Charleston, S. C., Jacksonville and Miami, Fla., to Seattle, Wash., Portland, Oreg., San Francisco, Oakland, Alameda and Los Angeles Harbor, Calif., (b) from San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor to Boston, Mass., New York Harbor, N. Y., Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (c) from Seattle and Portland to Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (2) of passengers between New Orleans, La., and Houston, Tex., on the one hand, and, on the other, Seattle, Portland, San Francisco,

Oakland, Alameda, Stockton and Los Angeles Harbor.

It further appearing, That there is a public need for continuance of the said water carrier service, that it is an activity of a continuing nature, and that this service corresponds in part with that which the carrier by application No. W-376 (Sub-No. 13) seeks a certificate of public convenience and necessity; and good cause appearing therefor:

It is ordered, That said carrier be, and it is hereby, authorized to continue to perform said water carrier service until further order of the Commission, but not beyond the time said application No. W-376 (Sub-No. 13) has been finally determined.

By the Commission, division 4.

[SEAL] HAROLD D. MCCOY, *Secretary*.

APPENDIX B

TITLE 49

PART 2—SPECIAL RULES OF PROCEDURE [REVISED]

Temporary Operating Authorities And Approvals

* * * * * *

§ 2.1 *Extension of temporary operating authority or approval.* The Commission will determine upon written request by any interested party, or it may determine upon its own initiative, whether under section 9 (b) of the Administrative Procedure Act (5 U. S. C. 1008 (b)):

(a) Any temporary operating authority granted under 210a (a) or 311 (a) of the Interstate Commerce Act (49 U. S. C. 310a (a), 911 (a)) is continued in force, beyond the expiration date specified in such temporary operating authority, until the determination of an application filed by the holder of such temporary operating authority for a certificate of public convenience and necessity or a permit to engage in operations authorized by such temporary operating authority.

(b) Any temporary approval granted under section 210a (b) or 311 (b) of the Interstate Commerce Act (49 U. S. C. 310a (b), 911 (b)), is continued in force, beyond the expiration date specified in such temporary approval, until the determination of the related application for approval of a consolidation or merger of the properties of two or more motor or water carriers or of a purchase, lease, or contract to operate the properties of one or more such carriers.

In order to afford sufficient time for consideration and action thereon, a written request for such a determination should be filed not later than 30 days

prior to expiration of the temporary operating authority or approval.

§ 2.2 *Definitions and interpretations.* In making the determination provided in § 2.1, the Commission will be guided by the following interpretations of the provisions of the 3d sentence of section 9 (b) of the Administrative Procedure Act (5 U. S. C. 1008 (b)), and of the provisions of section 210a (a) of the Interstate Commerce Act (49 U. S. C. 310a (a)):

(a) *Timely application.* An application for a certificate of public convenience and necessity or a permit filed in accordance with the applicable laws, regulations, and instructions, not later than 60 days after issuance of temporary authority for a period of 180 days or not later than 60 days after issuance of the first of a series of consecutive temporary authorities aggregating 180 days.

(b) *Sufficient application.* An application for a certificate of public convenience and necessity or a permit, which is in the form, contains the information, and is accompanied by the documents and exhibits required by the applicable laws, regulations, and instructions.

(c) *Aggregate of 180 days.* As used in section 210a (a) of the act and Commission notices and orders relating thereto, the term "for not more than an aggregate of one hundred and eighty days" means the total number of days of temporary authority which may be granted to a motor carrier under the provisions of that section of the act to meet a continuing need for a particular service.

(d) *Series of grants.* As relates to extensions of temporary authorities under section 9 (b) of the Administrative Procedure Act (5 U. S. C. 1008 (b)), only those grants of temporary authority for less than 180 days which have been approved to meet a

specific continuing need and which follow one after the other without interruption for a total of 180 days will be considered as a "series of consecutive temporary authorities aggregating 180 days."

(e) *Need considered not to be of a continuing nature.* Any need which is the basis of an operation authorized by a temporary authority or approval to be conducted for a period of less than an aggregate of 180 days is presumed not to be of a "continuing nature" unless the Commission otherwise expressly determines.

(f) *Final determination of application.* For the purpose of this section—(1) An application for a certificate or permit shall be considered to be "finally determined" (i) with respect to operations for which the certificate or permit is denied, upon the expiration of the period allowed by the rules and regulations of the Commission or by the order (whichever is greater) within which petitions for rehearing, reargument, or reconsideration may be filed, or upon the denial of such petitions if filed, and (ii) with respect to operations for which the certificate or permit is granted, when the certificate or permit becomes effective.

(2) An application for approval of a consolidation or merger of the properties of two or more motor or water carriers, or of a purchase of the properties of one or more such carriers shall be considered to be "finally determined" (i) in the case of denial of such an application, upon the expiration of the period allowed by the rules and regulations of the Commission or by the order (whichever is greater) within which petitions for rehearing, reargument, or reconsideration may be filed, or upon the denial of such petitions if filed, and (ii) in the case of approval of such an application, when the certificate or permit to

be transferred in connection with such application has been reissued in the name of the transferee and has become effective.

(3) An application for approval of a lease or contract to operate the properties of one or more motor or water carriers shall be considered to be "finally determined," (i) in the case of denial of such an application, upon the expiration of the period allowed by the rules and regulations of the Commission or by the order (whichever is greater) within which petitions for rehearing, reargument, or reconsideration may be filed, or upon the denial of such petitions if filed, and (ii) in the case of approval of such an application, when the order approving such application becomes effective.

§ 2.3 *Additional grant for new need.* If the need for a particular service ceases and the temporary authority covering such need expires or is revoked and a new or separate need arises subsequent to such expiration or revocation, additional temporary authority for the 180-day aggregate, or for a shorter period, may be granted to the same carrier for the service notwithstanding the prior grant or grants. However, an application filed after the expiration or revocation of temporary authority for an aggregate of 180 days will be denied unless the facts clearly show that the application is in reality based on a new need and not on a continuation of the need on which the prior grant of authority was based.

§ 2.4 *Termination of temporary authority or approval.* Nothing in this part shall be construed as preventing the Commission from terminating at any time, in accordance with law, any temporary authority or approval, or any extension thereof under section 9 (b) of the Administrative Procedure Act (5 U. S. C. 1008 (b)).

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 408

PAN-ATLANTIC STEAMSHIP CORPORATION, APPELLANT

v.

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.

No. 424

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 30–31) is reported in 144 F. Supp. 53.

JURISDICTION

Final judgment of the three-judge district court was entered on May 25, 1956 (R. 32). Notice of appeal in No. 408 was filed on July 25, 1956 (R. 39), and notice of appeal in No. 424 was filed on July 17,

1956 (R. 37). Probable jurisdiction was noted on November 19, 1956 (R. 44). The jurisdiction of this Court is conferred by 28 U. S. C. 1253 and 2101 (b).

QUESTION PRESENTED

Section 311 (a) of the Interstate Commerce Act provides that the Interstate Commerce Commission may, in its discretion and without hearings or other proceedings, grant temporary authority to operate as a common carrier by water between different ports of the United States, and that this temporary authority shall be valid for not more than 180 days. Section 9 (b) of the Administrative Procedure Act provides that no license granted by an agency of the federal government shall expire, if the licensee has duly applied for a renewal or a new license, until such application shall have been finally determined by the agency.

The question presented is whether the above provision of Section 9 (b) applies to temporary operating authority conferred pursuant to Section 311 (a) of the Interstate Commerce Act, and extends, or permits the Commission to extend, this temporary authority beyond 180 days.

STATUTES INVOLVED

Sections 2 and 9 of the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, provide in pertinent part:

> Sec. 2. As used in this Act—
>
> (a) AGENCY.—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government

of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. * * *

* * * * *

(c) LICENSE AND LICENSING.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. * * * [5 U. S. C. 1001]

* * * * *

SEC. 9. * * *

(b) LICENSES.—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall

have been finally determined by the agency. [5 U. S. C. 1008]

Sections 302, 309, and 311 of Part III of the Interstate Commerce Act, 49 U. S. C. 902, 909, 911, added to the Act by the Transportation Act, 1940, 54 Stat. 929, provide in pertinent part:

SEC. 302. For the purposes of this part—

* * * * *

(d) The term "common carrier by water" means any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property * * *.

* * * * *

(i) The term "interstate or foreign transportation" or " transportation in interstate or foreign commerce", as used in this part, means transportation of persons or property—

(1) wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States;

* * * * *

SEC. 309. (a) Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: * * *.

* * * * *

SEC. 311. (a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting

such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier by water or a contract carrier by water, as the case may be. Such temporary authority shall be valid for such time as the Commission shall specify but not for more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

STATEMENT

On May 6, 1955, Pan-Atlantic Steamship Corporation (Pan-Atlantic), appellant in No. 408, applied to the Interstate Commerce Commission under Section 309 of the Interstate Commerce Act (*supra*, p. 4) for a certificate of public convenience and necessity to operate as a common carrier by water in transporting freight and passengers between various Pacific and Atlantic ports (Pan-Atlantic Br. 5–6). On the same day, it filed with the Commission, pursuant to Section 311 (a) of the Act (*supra*, p. 4), an application for temporary authority to operate as a common carrier between such ports (*ibid.*). On May 18, 1955, Division 4 of the Commission entered an order granting this request and, as required by Section 311 (a), granted such temporary authority only for 180 days, that is, until November 14, 1955 (R. 9–10). On October 28, 1955, Division 4 entered a further order authorizing Pan-Atlantic to perform, until final determination of its application for permanent authority, the water-carrier service temporarily authorized by the order of May 18, 1955 (R. 14–15).

Following the Commission's refusal to reconsider the October 28, 1955, order (R. 18), the appellee railroads instituted the present suit to set this order aside (R. 3–9). Both the plaintiffs and Pan-Atlantic, which had been allowed to intervene as a party defendant (R. 20), filed motions for summary judgment (R. 27–29). A three-judge district court set aside the October 28, 1955, order on the authority of *Stone's Express, Inc.* v. *United States,* 122 F. Supp. 955,[1] decided two years earlier by a three-judge district court of the same district (R. 30–31).[2] The holding in *Stone's Express* was that Section 9 (b) of the Administrative Procedure Act did not repeal or supersede the prohibition in Section 210a (b) of the Interstate Commerce Act against grant of any "temporary approval" thereunder for a period of more than 180 days.[3]

---

[1] This Court, after noting probable jurisdiction of appeals from the court's judgment in *Stone's Express*, directed vacation of the judgment in accordance with the parties' stipulations as to mootness. 350 U. S. 906.

[2] In *Stone's Express*, the court consisted of Circuit Judge Hartigan and District Judges Ford and McCarthy. In the instant case, the court was composed of Circuit Judge Magruder and District Judges Ford and Wyzanski. The two district judges stated that, had they not felt bound by *Stone's Express*, they would have concluded that, by virtue of Section 9 (b) of the Administrative Procedure Act, the order of October 28, 1955 was not beyond the authority of the Commission (R. 31).

[3] Section 210a (b), 49 U. S. C. 310a (b), provides that, pending determination of an application by a motor carrier for approval of purchase of the operating rights of another motor carrier, the Commission may grant temporary approval of the proposed acquisition "for a period not exceeding one hundred and eighty days", if it appears that injurious consequences may result from failure to grant such temporary approval.

SUMMARY OF ARGUMENT

Section 9 (b) of the Administrative Procedure Act provides that if a licensee has made timely application for "a renewal or a new license, no license" relating to activity of a continuing nature shall expire prior to final administrative action on such application. To bring under the section temporary operating authority granted, for a maximum period of 180 days, under Section 311 (a) of the Interstate Commerce Act, it is necessary to assume that the last sentence of Section 9 (b) uses the word "license" ambivalently. As appellants interpret the section, it provides that if a temporary-authority "licensee" applies for "a renewal or a new [permanent-authority] license, no [temporary-authority] license" shall expire prior to final administrative action on "such [permanent-authority] application".

The ban in Section 9 (b) against license expiration pending final administrative action on a requested renewal or new license safeguards valuable existing rights, and is not prejudicial to interested third parties, when the existing license resulted from proceedings which afforded a hearing to those adversely affected and involved an administrative determination that public convenience and necessity required grant of the license. The temporary authority granted under Section 311 (a) presents a totally different situation. The Commission may grant this authority "in its discretion and without hearings or other proceedings". Third persons have not had their day in court; any determination of the need for temporary authority is

on an *ex parte* showing; and the grantee knows that he has and can obtain only a short-term authorization.

The foregoing distinction between the area within which Section 9 (b) operates fairly and equitably and the area within which it would not so operate has particular force as applied to the statutory time limit on temporary operating authority granted under Section 311 (a). A major purpose of the statute of which that section is a part was to prevent evils deemed to result from ease of entry and over-competition in the industry. Accordingly, the statute prohibits new carrier operations except after notice to affected parties, an evidentiary hearing, administrative findings as to the public convenience and necessity of the proposed service, and court review of the administrative determination. Moreover, the Commission, when it recommended that Congress enact the predecessor and exact counterpart of Section 311 (a), recognized that abuses might arise in the exercise of the proposed power, but emphasized as an offsetting consideration the strict time limit on any authorization granted under the section. And the temporary operating authorizations which have been actually granted at least suggest that they have not been duly confined, as the statute provides, to provision of service for which there is "an immediate and urgent need", which need no other carrier is capable of meeting.

If appellants' interpretation of Section 9 (b) is accepted, the section impliedly repeals the time limitation of Section 311 (a). The interpretation does violence to two universally recognized canons of statu-

tory construction. One is that repeals by implication are not favored, and are limited to cases where there is "positive repugnancy" between the provisions of the old law and those of the new. The other is that a statute specific in its subject matter prevails over one of general application, particularly if it is a question whether the general statute repeals the special statute by implication. Here it is not only possible to construe Section 9 (b) as not impliedly repealing the time limitation of Section 311 (a), but the contrary construction of Section 9 (b) rests on a labored and dubious interpretation of its provisions.

ARGUMENT

SECTION 9 (b) OF THE ADMINISTRATIVE PROCEDURE ACT DOES NOT REPEAL OR SUPERSEDE THE 180-DAY TIME LIMITATION WRITTEN INTO THE COMMISSION'S POWER TO GRANT TEMPORARY OPERATING AUTHORITY PURSUANT TO SECTION 311(a) OF THE INTERSTATE COMMERCE ACT

INTRODUCTION

Appellants rely on the Commission's interpretation of Section 9 (b) of the Administrative Procedure Act, and invoke the familiar doctrine that an administrative agency's interpretation of its statutory authority is to be accorded great weight. The "Special Rules of Procedure" in which the Commission embodied its interpretation (Comm. Br. 34–37) go little beyond a statement of the Commission's ultimate conclusion and therefore do not have the persuasiveness of a reasoned, expounded interpretation (cf. *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140). In any

event, the courts, though respecting an administrative agency's interpretation of its statutory power, must ultimately determine the limits on that power fixed by Congress. *East Texas Lines* v. *Frozen Food Express,* 351 U. S. 49, 54. We shall therefore consider the meaning conveyed by the words of Section 9 (b), and the legislative history and substantive provisions of both this section and Section 311 (a) of the Interstate Commerce Act, to determine the intent of Congress as it bears upon the interrelationship of the two sections.

The legislative history of the two sections is discussed in Point A which follows. Under Point B, we examine from three vantage points the question whether Section 9 (b) removes the time limitation incorporated in Section 311 (a): (1) the ordinary meaning of the language of Section 9 (b); (2) the probability or improbability that Congress intended to effect the change in substantive law which would result from striking down this time limitation; and (3) the applicable canons of statutory interpretation.

A. *The Legislative History of Section 311 (a) of the Interstate Commerce Act and Section 9 (b) of the Administrative Procedure Act.*

Section 311 (a) is a part of the Water Carrier Act, enacted in 1940 as Part III of the Interstate Commerce Act (*supra,* p. 4). It is an exact counterpart of Section 210a (a) of the Interstate Commerce Act, 49 U. S. C. 310a (a), enacted in 1938 as an additional section of the Motor Carrier Act of 1935, 52 Stat. 1238. This section was among various amendments to

the Motor Carrier Act which the Interstate Commerce Commission recommended to Congress. Sen. Doc. 154, 75th Cong., 3d Sess., 2–3, 13. Appellants have quoted part of the Commission's recommendation respecting Section 210a,[4] and we quote, as significant to the issue now before this Court, the balance of the Commission's recommendation (*id.*, 2–3):

> Cases arise, and have been brought to our attention, where urgent need for interstate motor carrier service suddenly develops. The bringing in of oil wells in a new field and conditions created by a flood or other calamitous visitation are good examples, and there are others.
>
> We believe that the Commission should have power to meet such emergencies by a grant of temporary operating authority, in its discretion and without hearings or other proceedings. It is recognized that care would be necessary to protect the legitimate interests of other carriers, and that the power could be abused. However, the Commission should be capable of using the power with proper discretion, and in any event the authority granted would be strictly limited in time by the terms of the proposed amendment. The advantages to be gained, in our opinion, outweigh the possible disadvantages. The amendatory act, which we recommend and which is contained in the appendix hereto, includes provisions for such grants of temporary operating authority.

Thus, the statute not only is explicit in making 180 days the limit of a grant of "temporary" authority,

[4] Pan-Atlantic Br. 22; Comm. Br. 10–11.

but Congress acted upon the basis that an offsetting consideration to possible abuse by the Commission of the power vested in it was that any temporary authority which it might grant would be "strictly limited in time".

The Second War Powers Act lifted the 180-day limitation of Sections 210a and 311 (a) for the period March 27, 1942 to December 31, 1944 (56 Stat. 176, 187). This suspension was perhaps the least important of numerous changes in law made by that Act and was scarcely mentioned in the congressional hearings and reports.[5] This period of suspension and the termination of other provisions of the Second War Powers Act were successively extended to December 31, 1945 (58 Stat. 827), June 30, 1946 (59 Stat. 658), and March 31, 1947 (60 Stat. 345). The last extension was made by the Act of June 29, 1946, subsequent to adoption of the Administrative Procedure Act (Act of June 11, 1946, 60 Stat. 237).

With one exception referred to later (*infra*, pp. 14–15), the legislative history of the Administrative Procedure Act appears to have little present pertinence. Appellants quote statements made in the course of congressional consideration that Section 9 (b) is necessary "because of the very severe consequences of the conferring of licensing authority upon administrative agencies," and that the section is designed to "remove the threat of disastrous, arbitrary, and irremediable administrative action" and to "amelio-

[5] Statements in Executive Session on S. 2208, Senate Committee Print, Second War Powers Act, 77th Cong., 2d sess.; Sen. Rep. 989, 77th Cong. 2d sess.; House Judiciary Committee Hearings on S. 2208, 77th Cong., 2d sess.; H. Rep. 1765, 77th Cong., 2d sess.

rate the difficulties where private parties are required to secure licenses" (Comm. Br. 17–19; Pan-Atlantic Br. 26–27). These general statements, however, give no indication that Congress intended that the section should apply to, and wipe out, the time duration fixed by statute for the temporary authorizations provided for in Section 311 (a) of the Interstate Commerce Act.

The Administrative Procedure Act was designed to promote greater fairness and regularity in administrative action, but neither its language nor its legislative history discloses any purpose to favor "licensees" or any other particular group as against those with conflicting rights or interests. A major purpose of the Water Carrier Act and of the Motor Carrier Act was to prohibit new operations without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity, to be granted only after giving those adversely affected an opportunity to be heard in opposition (*infra,* p. 16). A grant of temporary operating authority for the maximum period of 180 days was excepted from these requirements. If Section 9 (b) wipes out this time limitation, to the extent that grantees of temporary authority are benefited their competitors are prejudiced. The legislative history of Section 9 (b) shows no purpose to upset the accommodation between conflicting private interests, as made in the Water Carrier Act, and the actual provisions of Section 9 (b), point in the opposite direction. The section directs agencies to act with reasonable dispatch upon license applications, but qualifies this command by the phrase, "with

due regard to the rights or privileges of all the interested parties or adversely affected persons" (*supra*, p. 3).

B. *Section 9 (b) of the Administrative Procedure Act Does Not Apply to Temporary Authority Granted Under Section 311 (a) of the Interstate Commerce Act*

1. *The Meaning of the Words of Section 9 (b).*— This case turns on the meaning of the last sentence of Section 9 (b) of the Administrative Procedure Act:

> In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

We assume that the Act's broad definition of "license" (*supra*, p. 3) covers one who has been granted temporary authority under Section 311 (a) of the Interstate Commerce Act and that the grantee of such authority is a "licensee" within the meaning of Section 9 (b).

To come within the section, the licensee must have made timely and sufficient application for "a renewal or a new license." The word "renewal" necessarily relates to a license already held. In the context, the words "new license" would seem limited to a license of the same type or class as that already held. Certainly, the Ohio statute, declared by the Senate Judiciary Committee to be a "similar provision" (Sen. Doc. 248, 79th Cong., 2d sess., p. 35), expressly

so provides.[6] If this is the section's meaning, there was no "renewal" or "new license" which the Commission was empowered to grant to Pan-Atlantic, which had already been granted temporary authority for the maximum statutory period.

The section provides that if there has been a proper application for a renewal or a new license, "no license" with reference to an activity of a continuing nature shall expire prior to final determination of "such application". Appellants interpret this as meaning that "no [temporary authority] license" shall expire until the licensee's application for a "new [permanent authority] license" has been finally determined. In other words, the word "license" is used in the sentence in two different senses, first, as referring to a temporary-authority license and, second, as referring to a permanent-authority license. We set forth below the sentence as construed by appellants:

> In any case in which the [temporary authority] licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new [permanent authority] license, no [temporary authority] license with reference to any activity of a continuing nature shall expire until such application [for perma-

---

[6] The Ohio statute provided (Pan-Atlantic Br. 6a–7a):

"No licensee shall be required to discontinue the operation of a business or profession because of the failure of an agency to accept or reject said licensee's application for a *new license of the same type or class, or renewal of an existing license*, or application for registration, prior to the expiration of the license held by said licensee at the time said application was made where said application was filed with the agency within the time and in the manner provided by statute or rule of the agency. [Emphasis supplied.]"

> nent authority] shall have been finally determined by the agency.

We regard this interpretation of the section as highly artificial and improbable. The change in the Interstate Commerce Act which the construction would effect, considered below, constitutes in our view a further and decisive ground for rejecting appellants' interpretation of Section 9 (b).

2. *The Consequences of Appellants' Construction of the Section.*—A major purpose of the Motor Carrier Act, on which the Water Carrier Act was patterned, was to guard against the instability and other evils believed to result from ease of entry into the industry and over-competition. In *American Trucking Associations* v. *United States,* 344 U. S. 298, 312–313, this Court said:

> Then the industry was unstable economically, dominated by ease of competitive entry and a fluid rate picture. And as a result, it became overcrowded with small economic units which proved unable to satisfy even the most minimal standards of safety or financial responsibility. So Congress felt compelled to require authorization for all interstate operations to preserve the motor transportation system from over-competition, while at the same time protecting existing routes through the "grandfather" clause.

The relief or cure provided by Congress was to prohibit new carrier operations except under the following terms and conditions: application to the Commission under oath, accompanied by proof of service on interested parties; the making of certain findings

by the Commission, including a finding that the proposed service is or will be required by present or future convenience or necessity; and specification of the service to be provided, the routes to be operated and their termini.[7] Not a vestige of these safeguards is applicable to grants of temporary authority under Sections 210a (a) and 311 (a) of the Act, which provide that the Commission may grant such authority "in its discretion and without hearings or other proceedings".

In the case of licenses which can be granted only after hearings, consideration of the evidence, arguments of opposing parties, and administrative determination that the statutory criteria for a license issuance have been met, Section 9 (b), insofar as it keeps the existing license alive pending determination of a timely application for a renewal or new license, protects valuable existing rights and avoids possible injury resulting from administrative delay, without prejudicing rights of others.[8] But there are no like elements of fairness or equity in applying Section 9 (b) to temporary authority conferred pursuant to Section 311 (a) of the Interstate Commerce Act. There the original grant is on an *ex parte* showing and without any finding that statutory conditions for grant of permanent authority have been met, and the grantee knows that he is obtaining and can obtain operating

[7] Motor Carrier Act, 49 U. S. C. 306–308; Water Carrier Act, 49 U. S. C. 909.

[8] Licenses for operation of broadcasting stations, which cannot be granted "for a longer term than three years" (Sec. 307 (d) of Communications Act of 1934, 47 U. S. C. 307 (d)), are an instance of such application of Section 9 (b).

rights of only limited duration. Application of Section 9 (b) in this situation, so as to convert such temporary rights into rights continuing until the grantee's application for permanent authority has been finally determined by the Commission, operates to deprive competitors and other affected parties of the scrutiny and screening provided for in the Commerce Act with respect to the undertaking of new carrier operations.

Section 311 (a) provides that temporary authority is to be granted only to enable provision of service for which there is "an immediate and urgent need" and within territory having no carrier service "capable of meeting such need" (*supra*, pp. 4–5). If in fact there exists "immediate and urgent" need for service which no other carrier is capable of providing, 180 days would seem sufficient time for final administrative determination of the question whether the service is required by public convenience and necessity. Yet it appears that about 19% of all temporary authorizations granted during a five-year period under Sections 210a (a) and 311 (a) have been extended beyond 180 days (Comm. Br. 29).[9] It is difficult to reconcile requiring more than 180 days to determine the permanent-authority application if in each and every case the service in question was urgently and immediately

[9] Of course, many temporary authorizations are to meet emergencies of a passing nature (Pan-Atlantic Br. 32) and are for less than 180 days and are not accompanied or followed by application for permanent authority. Since these authorizations are included in the figures on which the 19% of extensions are based, 19% is an understatement of the percentage of those "temporary" authorizations involving continuing service which have been extended beyond 180 days.

needed and not rendered by any other carrier. The explanation would seem to be either that the facts submitted on *ex parte* applications for temporary operating authority are frequently not representative of the actual situation or that the Commission in its *ad hoc* rulings on these applications is very lenient in its interpretation of what satisfies the statutory conditions for grant of temporary authority. The facts, whatever the explanation, point up the importance of the 180-day limitation as a curb on "abuse" of the unreviewed and unreviewable power conferred by Sections 210a and 311 (a), which curb was called to the attention of Congress when the Commission proposed that Section 210a be enacted (*supra*, p. 11).

3. *Applicable Canons of Statutory Interpretation.*— This Court, citing earlier decisions of the Court, has said (*United States* v. *Jackson*, 302 U. S. 628, 631):

> Repeals by implication are not favored. A law is not to be construed as impliedly repealing a prior law unless no other reasonable construction can be applied.

That repeals by implication are not favored is a "cardinal principle of construction", and in order to conclude that there has been such a repeal there must be "a positive repugnancy between the provisions of the new law, and those of the old * * *." *United States* v. *Borden Co.*, 308 U. S. 188, 198–199.

Appellants have suggested that application of Section 9 (b) of the Administrative Procedure Act to temporary authority granted under Section 311 (a) of the Interstate Commerce Act does not repeal the 180-day limit incorporated in the latter section (Pan-

Atlantic Br. 27–28, 32–33; Comm. Br. 21, 27). The contention is that Section 311 (a) still prohibits the Commission from granting temporary authority for more than 180 days, but that Section 9 (b) automatically, and by its own force, extends the temporary authority beyond 180 days. But the Water Carrier Act prohibits new common carrier transportation by water except as authorized by Section 311 (a), which fixes 180 days as the limit of temporary authority which may be conferred. If Section 9 (b) automatically extends such authority whenever there has been a timely application for permanent authority, it wipes out the Section 311 (a) time limitation.[10]

When the Administrative Procedure Act was passed on June 11, 1946, the 180-day limitation of Section 311 (a) was to become operative again on June 30, 1946 (*supra*, p. 12). Section 9 (b) was to take effect three months after the statute's enactment (5 U. S. C. 1011). Thus, if appellants' interpretation of Section 9 (b) is accepted, it superseded as of September 11, 1946, the 180-day limitation of Section 311 (a). The general rule against repeal by implication

[10] The Commission's "Special Rules of Procedure" provide that if the grant of temporary authority was for less than 180 days, the activity authorized "is presumed not to be of a 'continuing nature' unless the Commission otherwise expressly determines". 49 C. F. R. 2.2 (e), Comm. Br. 36. The converse is that temporary authority granted for 180 days is presumed to involve activity of a "continuing nature" and is thus given automatic extension by Section 9 (b) if there has been timely application for permanent authority. In short, the Commission interprets 9 (b) as striking down the 180-day limitation except in grants of temporary authority which are for less than 180 days and therefore do not involve the 180-day limitation.

is reenforced by the fact that Congress, after passing the Administrative Procedure Act, extended the suspension of the 180-day limitation of Section 311 (a) from June 30, 1946, to March 31, 1947 (*supra*, p. 12)—an extension which was an empty gesture if Section 9 (b) operated to eliminate the 180-day limitation as of September 11, 1946.

The doctrine that repeals by implication are not favored has particular application where the later statute uses terms of general scope and the earlier one is a "special" statute dealing in precise terms with a specific subject. There is no doubt that this is the situation here. Section 9 (b) of the Administrative Procedure Act covers any "permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission" granted by any administrative agency of the United States Government. In contrast, Section 311 (a) of the Interstate Commerce Act, like its counterpart Section 210a, is of defined and precise scope, namely, grant of temporary authority to provide service as a common or contract carrier by water.

The rule of construction to which we have referred was stated as follows in *Rodgers* v. *United States*, 185 U. S. 83, 87–88:

> It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided

> for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special.

See, to the same effect, *Washington* v. *Miller,* 235 U. S. 422, 428.[11]

We submit that there is occasion here to apply the settled rule that a statute is to be interpreted, if possible, as not impliedly repealing a prior statute, particularly when it is a question of a general statute repealing provisions of a special statute. Not only is it possible to construe Section 9 (b) as not effecting such a repeal, but in our view the contrary construction is highly dubious (*supra,* pp. 14–16).

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[11] See, also, 2 Sutherland, *Statutory Construction*, 3d ed., Sec. 5204: "General and special acts may be *in pari materia.* If so, they should be construed together. Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling."

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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NO. 408

PAN-ATLANTIC STEAMSHIP CORPORATION,
APPELLANT

v.

ATLANTIC COAST LINE RAILROAD COMPANY,
ET AL., APPELLEES

NO. 424

INTERSTATE COMMERCE COMMISSION,
APPELLANT

v.

ATLANTIC COAST LINE RAILROAD COMPANY,
ET AL., APPELLEES

On Appeal From The United States District Court For The District of Massachusetts

BRIEF FOR THE PLAINTIFF-APPELLEES

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C. Temporary licenses outstanding for prolonged periods of time produce competitive changes as profound as permanent licenses; yet they are issuable *ex parte* and without any regard to their competitive effects 50

D. When empowering the Commission to issue temporary licenses Congress acted on the assurance that they must terminate within six months; if Congress had thought the Commission needed more than six months to process permanent certification applications, additional limitations would have been imposed on the Commission's temporary licensing powers before enlarging them to include licenses good for more than six months 53

V. The court below did not err in relying solely on *stare decisis* as a basis for decision. *Radovich* v. *National Football League* , U.S. , 25 Law Week 4152 (1957); *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953) 58

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STATEMENT OF THE CASE

The plaintiffs below filed a verified complaint which alleged in substance the following facts (R. 3-9): They are interstate carriers by railroad in the eastern and south eastern part of the United States which handle transcontinental passenger and freight traffic between the Country's east and west coasts in connection with other rail carriers. Pan-Atlantic Steamship Corporation, an interstate water carrier of freight and passengers along the east and Gulf coasts, was authorized on May 18, 1955 by the Interstate Commerce Commission, hereinafter sometimes called the Commission, to carry freight and passengers between certain east and west coast ports. This authorization issued without hearing under the provisions of section 311(a) of the Interstate Commerce Act, 49 U.S.C.A., 911(a) and was good for a term of only 180 days. (Exhibit 12, R. 9.) This license authorized carrier operations commercially competitive with those of plaintiffs which, at the time the complaint was filed, had already caused plaintiffs to lose revenues they otherwise could have earned and which had rendered partially unproductive plaintiff's investment in transportation facilities and equipment. On October 28, 1955 the Commission extended Pan-Atlantic's temporary intercoastal license, again without hearing, by lifting the 180 day restriction and making it good during the pendency of a formal application by Pan-Atlantic for an intercoastal certificate of public convenience and necessity filed May 5, 1955. (Exhibit 17, R. 14-15) This application had not been decided when the complaint was filed and the administrative process required to decide it is such that it is not likely to culminate for several years from May 5, 1957. The complaint contained the contention that,

> "15. The Commission's order of May 18, 1955 granting temporary authority to Pan-Atlantic, Exhibit 12, and the Commission's order of October 28, 1955 authorizing Pan-Atlantic to continue to perform the water carrier service previously authorized by said tem-

porary authority, Exhibit 17, together constitute a grant of temporary authority which has been, is and will be valid for more than an aggregate of 180 days.

"16. A grant by the Commission of temporary authority valid for more than an aggregate of 180 days is contrary to the provisions of section 311(a) of the Interstate Commerce Act; 49 U.S.C.A. 911(a) and is therefore unlawful, arbitrary and capricious." (R. 7)

In consequence the complaint asked that the Commission's order of October 28, 1955 be set aside. (R. 8)

The complaint impleaded the United States as defendant, and the Commission and Pan-Atlantic both intervened as defendants. (R. 19-20) The plaintiffs below moved for summary judgment on their verified complaint (R. 27), and Pan-Atlantic did so as well. (R. 28) The only verified pleading in the case being the complaint, and there having been filed no counteraffidavits by the defendants, the allegations of the complaint constitute the admitted facts on the basis of which the case was amenable to final judgment.

There is no evidence of record that any application for an intercoastal license filed with the Commission by Pan-Atlantic was responsive to any urgent or immediate need for intercoastal service. The Commission made a finding, on the basis of undisclosed information, that such a need existed on May 18, 1955. (Exhibit 12, R. 9) On October 28, 1955 the Commission made a finding, again on the basis of undisclosed information, that "a public need for continuance of" Pan-Atlantic's intercoastal service existed, but made no finding at that time that any urgent or immediate need existed. (Exhibit 17, R. 14)

The Commission's findings concerning Pan-Atlantic's application for an intercoastal certificate of public convenience and necessity filed May 5, 1955 did not include a finding that

the service being provided by Pan-Atlantic under its temporary license "was contained within the scope of" that application. The Commission did find on October 28, 1955 that the temporarily licensed service "corresponds in part with that" sought by the May 5, 1955 application. (Exhibit 17, R. 14)

The plaintiffs having exhausted their administrative remedy (R. 6-7), on the basis of these facts the District Court granted judgment for the Plaintiffs and ordered set aside the Commission's order of October 28, 1955 (Exhibit 17, R. 14) extending Pan-Atlantic's temporary license (Exhibit 12, R. 9) beyond the 180 days for which it had been granted originally. (R. 32-33) In a concurring opinion District Judges Wyzanski and Ford stated that, had not the District Court previously decided the same question adversely to the Commission in *Stone's Express* v. *United States*, 122 F.Supp. 955 (1954), these two judges would refuse to vacate the Commission's order of extension. Circuit Judge Magruder did not join in these views.

After obtaining an order staying judgment, unopposed by plaintiffs (R. 36), the Commission and Pan-Atlantic took these appeals (R. 37-41).

The basis for the judgment of the court below was that only section 311(a) of the Interstate Commerce Act, 49 U.S.C.A., sec. 911(a), authorized the Commission to issue temporary water carrier licenses without a hearing, and that statute contains the limiting words, "such temporary authority shall be valid * * * not for more than an aggregate of one hundred and eighty days * * *."

The basis for appeal is in substance that the third sentence of section 9(b) of the Administrative Procedure Act, 5 U.S.C.A., sec. 1008(b) prohibits the expiration of agency licenses with reference to activity of a continuing nature

during the pendency of the application, "in any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license."

It is of interest to note that the temporary license here sought to be vacated is good only during the pendency of another licensing proceeding now before the Commission. When that proceeding, Docket W-376 Sub-13, has been concluded by a final order either granting or denying the intercoastal certificate therein sought, the subject temporary license will by its terms expire. In that event this appeal and this case will become moot. *Eastern Airlines* v. *Civil Aeronautics Board*, 341 U.S. 901, 95 L. ed. 1341. Dismissal for mootness was the ultimate fate of the complaint in *Interstate Commerce Commission* v. *Stone's Express, Inc.*, 350 U.S. 906, 100 L. ed. 795 (1955). It is apparent therefore that, arguable and substantial as may be the question whether the Commission has the power to extend temporary licenses beyond 180 days and during the pendency of applications for permanent licenses, it is a question extraordinarily difficult to preserve for decision before this Court. This consideration very likely accounts for the paucity of precedent on the issue.

SUMMARY OF ARGUMENT

Pan-Atlantic's activity as an intercoastal water carrier which this case seeks to end is prohibited by section 309 of the Interstate Commerce Act except in two circumstances. The first is that Pan-Atlantic obtain a certificate of public convenience and necessity from the Commission. This cannot be done over competitors' protests unless after a formal hearing at which competitors are able to present evidence concerning their own and the public's interest, and such a certificate cannot issue unless on the basis of adequate findings that a public need exists and that existing carriers will not be unduly harmed to the detriment of the public interest. Such findings must be based on substantial evidence.

The only other basis upon which Pan-Atlantic can provide intercoastal service is to obtain a temporary license or "authority," as it is called, under section 311(a) of the Interstate Commerce Act. Section 311(a) forbids such license to be valid for more than "an aggregate of one hundred and eighty days." This complaint was brought after Pan-Atlantic had obtained such a temporary license, after 180 days had expired, after Pan-Atlantic had applied for a permanent intercoastal certificate under section 309 of the Interstate Commerce Act, and after the Commission had extended Pan-Atlantic's temporary intercoastal license for the duration of the pendency of its application for permanent certificate.

Because the exercise of such temporary licenses over periods in excess of one year can be as irretrievably harmful competitively as the improvident issuance of permanent certificates, the plaintiffs have objected to the Commission's extension of Pan-Atlantic's temporary license beyond the six month statutory period. The Commission's reply is that the third sentence of section 9(b) of the Administrative Procedure Act empowers a postponement of Pan-Atlantic's 180 day license until a final order has issued in the certification proceeding.

This is not true firstly because the Administrative Procedure Act provides no basis by which to determine what sort of permanent certificate application will postpone expiration of a temporary license. Inasmuch as the Administrative Procedure Act suspends license expiration by operation of law there is no room for agency regulations or exercise of agency discretion to supply such a basis. Unless the pending application seeks the same license presently being exercised by the licensee, the third sentence of section 9(b) of the Administrative Procedure Act should not be construed to postpone expiration of the existing license because of the chaotic regulatory condition which otherwise would result.

Pan-Atlantic's temporary intercoastal license is quite different from the permanent certificate it seeks because it issues after adjudication, with due consideration given to competitors' interests and is not within the Commission's power to terminate over Pan-Atlantic's objection. *United States* v. *Seatrain Lines*, 329 U.S. 424.

Secondly the Administrative Procedure Act, section 9(b), third sentence does not affect temporary licenses during the pendency of permanent licensing proceedings because the legislative history of section 9(b) indicates that Congress in 1946 attempted to achieve by it a result the same as that produced by the Ohio Administrative Procedure Act. The Ohio legislation in 1943 was not applicable except during the pendency of an application filed by a licensee who was such at the time he filed the application. Pan-Atlantic was not a licensee when it filed its application for a permanent certificate; it became one afterwards. And it required that in order for an application to suspend expiration of an existing license, the application had to be one for a license of the same "type" or "class." As stated above a temporary and a permanent I.C.C. carrier license are not licenses of the same type or class. The pattern both of the Federal and the Ohio acts indicate they are aimed at postponement of license expirations during the pendency only of renewal license applications, and that this is the reason for the more specific language used in the Ohio legislation.

Not only does Pan-Atlantic have pending no application for renewal of its temporary intercoastal license, but there is indication in the legislative history of the portions of the Interstate Commerce Act which enable temporary licensing, sections 210a and 311, that Congress in enacting them relied on the proposition that such temporary licenses would be good only for six months. That six-month period should not be extended until unduly harmful competitive effects had

been guarded against by legislation which it is not within this Court's power to enact. Precautions to this end could include a mandatorily preferred position on the Commission's docket of proceedings ancillary to temporary licensing, and mandatory investigation and hearing procedures to be followed prior to extending temporary licenses, perhaps based on relatively short orders of notice and limited rights of appeal and court review.

ARGUMENT

This case arises because Pan-Atlantic Steamship Corporation is engaging in intercoastal operations without a certificate of public convenience and necessity from the Interstate Commerce Commission authorizing such activity. It is very important that interstate carriers by motor and by water refrain from carrier operations not authorized by certificates, because, as is explained in detail *infra*, non-certificated activity is competitively destructive in a closely regulated area of private enterprise. Because the transportation market is thus regulated under the Interstate Commerce Act and is not a free one, the entry into it of an additional carrier with a large capital investment can have a profound effect on the revenues of carriers already in the market and eventually can destroy some of them, to the ultimate detriment of the public interest. Before issuing water carrier certificates of public convenience and necessity under section 309 of the Interstate Commerce Act, 49 U.S.C.A., sec. 909, and motor carrier certificates under section 207, 49 U.S.C.A., it is the Interstate Commerce Commission's practice and policy to make sure that the operations to be authorized will not produce the destructive effects described above. And the method by which the Commission obtains such assurance is to assign protested certification applications for formal hearing, to invite adversary evidence from competitors by pub-

lishing notice of such applications in the Federal Register, *e.g.*, 49 C.F.R., secs. 1.240 and 1.241, and to publish reports recommended by hearing examiners prior to final decision.

On May 18, 1955 Pan-Atlantic was licensed to conduct an intercoastal operation by a licensing procedure which was not attended by any of these safeguards. It was given a license issuable by an *ex parte* and summary procedure under section 311(a) of the Interstate Commerce Act, 49 U.S.C.A., sec. 911 (a); termed a "temporary authority." As is explained more fully hereinafter that section was enacted by the Congress in exactly the same terms and circumstances that caused section 210a(a) of the Interstate Commerce Act, 49 U.S. C.A., sec. 310a(a) to be enacted concerning motor carrier temporary authorities, and in adopting section 210a(a) of the act the Congress had reason substantially to rely on a representation made to it several times by Commissioner Eastman that such temporary authorities could not extend beyond 180 days. In conformity with the statute, Pan-Atlantic's temporary authority which issued May 18, 1955 recited that it expired in 180 days, *i.e.*, on November 14, 1955. It is the appellees' vigorous contention that the only reason the Congress permitted the issuance of licenses under sections 210a and 311 of the Interstate Commerce Act by summary and *ex parte* procedures which, nonetheless, could seriously alter competitive relationships in the carrier area of enterprise subject to regulation, was the Congress' belief that such alterations would not occur in the six months or less to which such licenses would be limited.

Today, March 26, 1957, Pan-Atlantic's intercoastal license has been outstanding not for six months as prescribed by the uncontestably and concededly plain terms of the statute under which it issued, but for more than twenty-two months and, were it not for the judgment below, that license could reasonably be expected to remain outstanding for as long as

three and one-half to four years. This is true because on October 28, 1955 the Commission extended that temporary license for the duration of a certification proceeding concerning Pan-Atlantic's application for an intercoastal certificate under section 309 of the act, 49 U.S.C.A., sec. 909. To justify this action the Commission has cited a statute which has nothing to do with temporary licensing of the sort enabled by section 311 of the Interstate Commerce Act, and has attempted to endow that statute with a construction which is unwarranted, distorted and, most important, disastrously destructive of the regulatory scheme of the Interstate Commerce Act and other statutes empowering federal agencies to regulate the conduct of industries in interstate commerce. That statute is the third sentence of section 9(b) of the Administrative Procedure Act and, while the burden of this brief must be addressed to the meaning of that statute, the appellees ask that the tortuous and surprising meaning which appellants seek to assign to this sentence be weighed throughout in the balance with the clear and unequivocal words of section 311(a) of the Interstate Commerce Act:

> "Such temporary authority shall be valid for such time as the Commission shall specify *but not for more than an aggregate of one hundred and eighty days.* * * *."

I. Section 9(b) of the Administrative Procedure Act was enacted contemporaneously with the enactment of the Ohio Administrative Procedure Act containing provision similar to section 9(b)'s third sentence.

This case requires decision concerning the meaning of the third sentence of section 9(b) of the Administrative Procedure Act, 5 U.S.C.A., Sec. 1008 (b). The sentence reads:

> "* * * In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for renewal or a new license, no license with

reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency."

This statute's legislative history explains that it is similar to a provision "in the licensing procedure act of the State of Ohio (Act of June 3, 1943, sec. 1 amending secs. 154-167 [sic] of the General Code; Amended Substitute Senate Bill No. 36.)" *Legislative History—Administrative Procedure Act*, p. 35, Senate Document No. 248, 79th Congress, 2nd Session. The laws of Ohio for 1943 and 1944, Volume 120, page 361 contain the following enactment:

"No licensee shall be required to discontinue the operation of a business or profession because of the failure of an agency to accept or reject said licensee's application for a new license of the same type or class, or renewal of an existing license, or application for registration, prior to the expiration of the license *held by said licensee at the time said application was made* where said application was filed with the agency within the time and in the manner provided by statute or rule of the agency." (Amended Substitute Senate Bill No. 36, enacting the Ohio Administrative Procedure Act, May 20, 1943, 120 Ohio Laws, pp. 358-405).

On June 28, 1945, this language in the Ohio code was amended, see Laws of Ohio, Vol. 121, pp. 578-582, and see Page's Ohio Revised Code Annotated, Title 1, sec. 119.06:

"* * * *Where periodic registration of licenses or renewal of licenses is required by law,* a licensee who has filed his application for registration or renewal within the time and in the manner provided by statute or rule of the agency, shall not be required to discontinue a licensed business or profession merely because of the failure of the agency to act on his application. Action of an agency rejecting any such application shall not be effective prior to 15 days after notice of the rejection is mailed to the licensee."

Both appellants, rather summarily we believe, suggest that if the United States Congress had desired to enact a statute the effect of which would be the same as that of the Ohio enactment of 1943 presumably Congress would have used the language used by the Ohio legislature. (I.C.C. Brief, p. 25; Pan-Atlantic Brief, p. 19)

However that may be, it is thought the Court should have the opportunity to review the three legislative statements of much the same sort of statutory enactment because, regardless of what the "intent of the legislature" was in each instance, these three bits of legislative language indicate the possible existence of a *single* overall goal to be sought by legislation, and the extent and shape of the semantic boundaries within which language can reasonably be drafted to achieve it. It is readily conceded that the three examples of draftsmanship quoted above are not characterized by equal degrees of precision.

A. The Ohio Administrative Procedure Act suspends license expirations only during the pendency of an application to renew an existing license.

The two Ohio statutes prohibit the "requiring" of a "licensee" to "discontinue a business or profession." The first version referred to discontinuance of the "operation" of a business or profession, and the second to discontinuance of a "licensed" business or profession. The federal statute forbids a "license to expire." Thus the Ohio statutes address themselves to the exercise of a privilege, and the federal statute is concerned with the existence of the privilege. However, in each case it is the same sort of privilege because the federal license is described as one "with reference to an activity of a continuing nature," which, while broader, is the same sort of activity as "operation of a licensed business

or profession."* To this point the three statutes do not differ materially; one may be more precise and another more succint, but the ultimate purpose underlying them is so clear that constructions which would cause their applicability to vary would appear unwarranted.

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* The Interstate Commerce Commission would appear to err in its belief that it may form a sort of value judgment as to whether the activity involved is one of a "continuing nature." See the Commission's brief, p. 11:

> "Where the evidence indicates an immediate and urgent need for a definite period which is less than 180 days, the Commission grants temporary authority for the period of the need and the operation is not regarded as of a continuing nature beyond that period, within the meaning of section 9(b)."

And see Title 49, Part 2 of the Commission's regulations, section 2.2(e), the Commission's brief, p. 36:

> "(e) *Need* [sic] considered not to be of a continuing nature. Any *need* which is the *basis* of an operation authorized by a temporary authority or approval to be conducted for a period of less than an aggregate of 180 days is presumed not to be of a 'continuing nature' unless the Commission otherwise expressly determines."

Prior to its amendment on September 16, 1954, that regulation, as originally enacted by the Commission's order of July 6, 1948, read:

> "(c) An *operation* authorized by a temporary authority or approval to be conducted for a period of less than an aggregate of 180 days is presumed not to be of a 'continuing nature' unless the Commission otherwise expressly determines."

Activity of a "non-continuing" nature would be such that, if the expiration of the license to engage in it were suspended, the licensee could present a *fait accompli*. For example, if the license involved were one to erect a structure, dig a ditch or consummate a financial transaction within a stipulated period of time, and if that time were extended by operation of law pending application for a renewal license, the renewal application would become moot if the original license were exercised within the extension period.

It is perhaps questionable whether the policy decision to contest this appeal would have been made by the Commission if it were understood that activity of a "non-continuing nature" is a concept of narrower scope than that entertained by the Commission. For this reason the Commission finds itself at odds with its co-appellant, Pan-Atlantic, who says at page 29 of its brief:

> "That action (by the Commission in extending temporary authorities) is an extension of the temporary license *by operation of law* (section 9(b)), and *not by operation of discretionary authority vested in the Commission.*"

As well as requiring that the privilege preserved from expiration be one with reference to activity of a continuing nature or with reference to operation of a profession or business, do these statutes impose a further limitation on the scope of their applicability? The present Ohio statute is quite clear about the matter; it is restricted to licenses which "by law" must be "periodically registered or renewed." The prior Ohio statute of 1943 used more words to achieve the same result with less precision. It was limited to licenses which could be supplanted by "a new license of the same type or class," to licenses which could be "renewed" and to licensed privileges which could be exercised only when the identity of the licensee and his intent to continue exercise of the licensed privilege was, at stated intervals, "registered" with the issuing agency. The 1943 Ohio statute was thus limited because the expiration of licensed privileges was suspended only when an application for a "new" or "renewal" license or for such a "registration" had been filed.

The federal statute sets forth no such explicit limitation, because it is effective when there is application for a "new license," and the "new license" is not limited to one "of the same type or class" as the existing license, the expiration of which is suspended by the statute. None-the-less is there reason to believe it is thus limited?

B. The Federal Act suspends agency license expirations during the pendency of a licensing application only when the application was filed subsequent to the issuance of the license preserved from expiration.

To answer this question it is useful to bear in mind the entirety of section 9(b) of the Administrative Procedure Act, 5 U.S.C.A., sec. 1108 (b). The first sentence requires the agency to reach its decision on whether to grant a license "required by law" with "reasonable dispatch" and "with due

regard to the rights or privileges of all the interested parties or adversely affected persons."

> "In any case in which application is made for a license required by law the agency, with due regard to rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision."

This sentence, then, is addressed to the initial posture of a licensing situation, when there is as yet no "licensee" in existence, and when someone possessing merely the status of "applicant" is asking agency relief. For applicant's benefit the sentence requires "reasonable dispatch" from the agency; in the public interest the agency is required to entertain the application "with due regard" to the interests of applicant's competitors and patrons.

The second sentence (with reasonable exceptions) prohibits the agency from cancelling a license for cause unless first the licensee has been given an opportunity to comply with "all lawful requirements."

> "Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements."

The second sentence of course presumes that the initial stages of the licensing situation are over, and that there is a licensee in existence, because it is concerned solely with limitations

on the agency's powers to take his license away from him. The next and final area to be dealt with is the period when the license terminates by its own terms. The third and final sentence of section 9(b) addresses itself to this period with the initial words:

> "In any case in which *the* licensee *has*, in accordance with agency rules, made timely and sufficient application for a renewal or a new license * * *."

In this context, and placed as they are at the physical and chronological end of a statutory review of the licensing process, the words "*the* licensee" imply to the usual reader, hence to the usual drafter, that the enacting legislative assembly had in mind "the licensee *who has already been licensed, as discussed above.*" Ordinarily a great deal should not turn on the drafter's choice between the definite and indefinite article, but in this context the suggestion is most persuasive that "the" licensee was spoken of in the third sentence of section 9(b) because the statute is dealing with "the same" licensee whose affairs have evolved under the foregoing provisions of the first two sentences of that section.

With these considerations in mind the statement by the Senate Committee on the Judiciary concerning section 9(b)'s third sentence is rather significant:

> "A similar provision is contained in the licensing procedure act of the State of Ohio (Act of June 3, 1943, sec. 1, amending sec. 154-167 (154-67?) of the General Code; Amended Substitute Senate Bill No. 36.)"
>
> (*Legislative History—Administrative Procedure Act*, 79th Cong., 2nd Sess., S. Doc. No. 248, p. 35)

That was the Ohio statute of 1943 which, it will be recalled, prohibited expiration only of licenses "held by said licensee at the time said application was made." The United States

Congress was warranted in assuming that the third sentence of a three-sentence statute would be read as referring to renewal applications filed by existing licensees when the first two sentences dealt with issuance and withdrawal of licenses, and when the committee report indicated the legislative belief that this third sentence achieved something similar to state legislation the effect of which was confined to applications filed by existing licensees.

Possibly with this sort of analysis in mind, the United States District Court for the District of Massachusetts, in deciding *Stone's Express* v. *United States*, 122 F.Supp. 955, 957-8 (1954) said:

> "The Third sentence of section 9(b), however, in using the words 'In any case in which the *licensee* has * * * made timely and sufficient application for a renewal or a new license, * * *' indicates that the statute presupposes at the time of the filing of the application the existence of a licensee. (Italics ours). The language of the statute thus clearly reveals that it was designed to prevent a license in existence at the time of the filing of the application for a renewal or a new license from terminating until the agency has finally determined whether or not to grant the renewal of the new license."

As was true of the applicant for license in the *Stone's Express* case, Pan-Atlantic in the case at bar was not on May 5, 1955, a licensee when it filed its application for a permanent intercoastal license to succeed the 180 day intercoastal license which it had originally received (R. 4, par. 6; R. 6, par. 8).

C. The purpose underlying the Federal requirement that the existing license have issued prior to the filing of the successor application is the same as that expressed by the Ohio act, namely to postpone agency license expirations only during the pendency of renewal applications.

Why should it have made any difference to the Congress whether the third sentence of section 9(b) was triggered into effect only when an application was filed by a licensee? Why would not the legislative purpose be served just as well by prohibiting license expiration whenever, regardless of the circumstances, there was pending an application for a successor license? The answer must be that situations "where periodic registration of licenses or renewal of licenses is required by law" (the later, 1945, Ohio statute) provide no occasion for the simultaneous pendency of two undecided applications by the same applicant for the same license. By excluding situations where the applicant for a "renewal" or a "new" successor license had not yet received his initial license, the Congress believed it was confining the prohibitive effect of the third sentence of section 9(b) to license-renewals.

Evidently the Ohio legislature, two years after it had used language to the same effect in 1943, noticed that, while it served the desired purpose in a situation such as that of Pan-Atlantic's in the case at bar, the 1943 Ohio statute could conceivably be interpreted more broadly to include an application, even though filed by a licensee, who was seeking not a renewal or a supplanting "new license" but rather a license of a different type covering the same activity. True, the 1943 Ohio statute had no effect unless there was filed an application "for a new license of the same type or class," but that language left room for argument and litigation concerning the boundaries of "types" and "classes" of licenses. So the 1945 Ohio amendment stated what was desired with greater precision. It is true that the United States Congress has not given the matter further attention in contradistinction to the action of the Ohio legislature. However, as is discussed below, importance attached to what Congress has not done can put a Janus-faced visage on this matter.

Therefore at this point in the legislative evolution of section 9(b) it appears that the Congress may reasonably be deemed to have aimed the third sentence of that enactment at "periodic registration or renewal of licenses."

> "The third sentence automatically extends a license in any case in which the licensee has made timely application for renewal but the granting agency fails to act prior to the expiration of the existing license."
>
> Report of Senate Committee on the Judiciary, *Legislative History—Administrative Procedure Act*, 79th Cong,. 2nd Sess., S. Doc. No. 248, p. 35.

At the most it might be said that that aim was, not wide of the mark, but a little broader than the mark if the statute can be said to include applications by a temporary licensee for a permanent license. But the report writer for the Senate Committee, at least, was sure that the third sentence dealt with renewals, hence with applications filed by a licensee who already had a license for the renewal of which to apply.

The rather extensive analysis of the two Ohio statutes and comparison of them with the federal statute set forth above is not meant at all to suggest that they are any sort of "precedent" for a proper interpretation of the Administrative Procedure Act. Nor can the Ohio act of 1945 in any way fairly be said to have been within the contemplation of the Congress when the Administrative Procedure Act was enacted on June 11, 1946, because the Senate Committee report refers only to the Ohio Act of 1943 and not to that of 1945. Indeed, had the Congress been aware of what the Ohio legislature did in 1945, it is very possible that the language of section 9(b) would have congealed in a form somewhat more precise than that before the court today.

This Ohio legislation is useful, however, as a sort of case study of an attempt to shape statutory language to a given

end. If it be assumed—and the Senate Committee Report's statement quoted above warrants the assumption—that the two legislative assemblies had much the same goal and underlying purpose in mind, then the ultimate refinement of the Ohio language is a useful guide to a purposeful interpretation of the present federal statute. To accept appellant's suggestion (I.C.C. Brief, p. 25, Pan-Atlantic's Brief, p. 19) that, because the Congress did not adopt the exact language of the Ohio 1943 statute, it intended something different from what was achieved by the Ohio legislation would no doubt be a facile but, in our view, not a very faithful disposition of the matter.

II. The difference between permanent and temporary licenses under Parts II and III of the Interstate Commerce Act:

The foregoing review of the Administrative Procedure Act is in point because on May 18, 1955, the Interstate Commerce Commission issued to Pan-Atlantic Steamship Corporation (applicant licensee before the Commission, intervening defendant below, appellant here) a license to carry by water between points on the east and west coasts of the United States—a so-called intercoastal certificate. This certificate was good for only 180 days (R. 9-10). On October 28, 1955, without a hearing, the Commission extended the duration of this certificate beyond 180 days until a final decision had been reached on an application filed by Pan-Atlantic for a permanent intercoastal certificate (R. 14-15).

A. Permanent licenses are issued only after an agency hearing which must meet the requirements of sections 5 and 7 of the Administrative Procedure Act.

The carrier operations involved are prohibited by section 309(a), of the Interstate Commerce Act, 49 U.S.C.A., sec. 909(a),

> "* * * unless (the carrier engaging in such operations) holds a certificate of public convenience and necessity issued by the Commission."

Section 309(c) of the act, 49 U.S.C.A., sec. 909(c), empowers the Commission to issue such a certificate only if it finds that

> "* * * the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity * * *."

Furthermore, these findings, at least when they are contested, must be made on the basis of information gathered at adjudication hearings as provided in sections 5 and 7 of the Administrative Procedure Act, 5 U.S.C.A., secs. 1004, 1006. *Pinkett* v. *United States*, 105 F.Supp. 67 (D., Md., 1952), construing *Riss & Co.* v. *United States*, 341 U.S. 907, 95 L.ed. 1345 (1951) and *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 94 L.ed. 616 (1950). Although *Pinkett* relied in part on *L. A. Tucker Truck Lines* v. *United States*, 100 F.Supp. 432 (E. D., Mo., 1951), which was reversed *sub nom. United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 97 L.ed. 54 (1952), it is clear that that reversal had nothing to do with the principle for which *Pinkett* is cited above. *Monumental Motor Tours* v. *United States*, 110 F.Supp. 929 (D., Md., 1953).

Thus before certificates may issue under section 309 persons with interests adverse to applicants must be notified of the time and place of hearings, and hearings must be fixed for times and places with due regard to the convenience and necessity of the parties. Administrative Procedure Act, Sec-

tion 5(a), 5 U.S.C.A., sec. 1004(a). Opportunity must be afforded all interested persons to submit facts and argument at the hearing, section 5(b), requests for findings, and exceptions to recommended reports and orders, section 8(b), 5 U.S.C.A., sec. 1007(b). Every party has the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct cross-examination. Section 7(c) of the Administrative Procedure Act, 5 U.S.C.A., sec. 1006(c).

B. Temporary licenses are issuable *ex parte* and on the basis of findings different from those needed to justify a permanent license.

This can be a time-consuming process. Therefore to cope with an "immediate and urgent need" for transportation services a carrier is relieved of the prohibition in section 309(a) in the Interstate Commerce Act quoted above if the Commission is willing, "in its discretion," to give him "temporary authority" to render the service required. Section 311(a) of the Interstate Commerce Act. This the Commission may do "without hearings or other proceedings." However,

> "Such temporary authority shall be valid for such time as the Commission shall specify but *not for more than an aggregate of one hundred and eighty days* * * *."
>
> Interstate Commerce Act, section 311(a), 49 U.S.C.A., sec. 911(a).

The Commission's grant of an intercoastal license to Pan-Atlantic on May 18, 1955, was such a "temporary authority" (R. 6, par. 8; R. 9-10, Exhibit 12).

When, therefore, the Commission extended this temporary license on October 28, 1955, beyond the 180 day limit, without holding a hearing, without providing an opportunity for

presentation by the parties of their case by oral evidence, without a report of its findings on that evidence, and without making the findings required by section 309(c) of the Interstate Commerce Act quoted above (R. 6; R. 14, Exhibit 17), the question arose, by what provision of law was such an extension exempted from the provisions of section 309 of the Interstate Commerce Act and from sections 5(a), 5(b), 7(c) and 8(b) of the Administrative Procedure Act? The appellees on October 13, 1955, advised the Commission of their view that there existed no warrant in law for such Commission action (R. 12, Exhibit 16), and exhausted their administrative remedy by petition filed on or about November 23, 1955 (R. 15, Exhibit 18) and denied by order dated January 9, 1956 (R. 18, Exhibit 19).

Explanation for the Commission's failure to comply with section 309(c) of the Interstate Commerce Act and with the Administrative Procedure Act as cited above begins with the fact that on May 5, 1955 Pan-Atlantic had filed with the Commission an application for intercoastal authority pursuant to the provisions of section 309 of the Interstate Commerce Act. (R. 4-5, pars. 6-7). The temporary intercoastal authority which the Commission granted Pan-Atlantic 13 days later on May 18, 1955 was appreciably more limited in scope—that is, it authorized service between fewer ports, than was applied for on the prior May 5th. (R. 6, par. 6; R. 3-4, par. 3; R. 4, par. 6). As indicated by Exhibit 12 (R. 9), that grant of temporary authority was not responsive to the May 5th application, but to another one "made * * * under the provisions of section 311(a) of the Interstate Commerce Act." The date on which the section 311(a) application was filed and the circumstances which gave rise to it are not of record. (Pan-Atlantic brief, p. 6) The May 5th application for permanent authority was still pending and undecided by the Commission on October 28, 1955 (R. 6, par. 12) when the Commission issued its

extensions of temporary authority here under adjudication, (R. 7, pars. 20 and 21) nor had it terminated when the complaint herein was filed on April 30, 1956 (R. 9). Until and if this Court receives a suggestion of mootness such as was the basis for dismissal of the appeal in *Interstate Commerce Commission* v. *Stone's Express*, 350 U.S. 906, 100 L. ed. 795 (1955), it may reliably be presumed that no final order has been entered by the Commission and has become effective responsive to the May 5th permanent authority application. The extension of the temporary authority beyond 180 days by the Commission's order of October 28, 1955, which the Court below ordered vacated, was limited to a duration "not beyond the time said application No. W-376 (Sub-No. 13) has been finally determined" (R. 14-15, Exhibit 17), in other words, was limited to the period of pendency of the permanent authority application of May 5, 1955.

The Commission viewed the permanent authority application as

> "a case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license."
>
> Administrative Procedure Act, section 9(b), 5 U.S. C.A., sec. 1008(b)

Therefore the Commission believed Pan-Atlantic's temporary authority granted May 18, 1955 to be, "a license with reference to * * * activity of a continuing nature" which section 9(b) prohibits from expiring until the "timely and sufficient application for a renewal or a new license" has "been finally determined by the agency."

C. Therefore temporary Interstate Commerce Commission licenses are of a "type" and "class" different from those of permanent licenses.

If this case were governed by the 1943 original Ohio legislation the May 5th application would have to be one of

"the same type or class * * * of (the) existing license," and the license preserved from expiration would have had to be held by Pan-Atlantic on May 5, 1955 when the permanent authority application was filed. Obviously the temporary authority was not thus held on May 5, 1955.

Does it differ in "type or class" from that sought by the May 5th application? Rather extensively, must be the answer:

Temporary authority granted May 18, 1955	Permanent authority applied for May 5, 1955
Duration of the subject license:	
Limited to a period of 180 days. (R. 9-10, Exhibit 12) 49 U.S.C.A., sec. 911(a).	Unlimited in duration. (R. 4-5) *United States* v. *Seatrain Lines*, 329 U.S. 424, 91 L. ed. 396 (1947)
Findings prerequisite to the grant:	
It will "enable the provision of service for which there is an immediate and urgent need to a point or points within a territory having no carrier service capable of meeting such need." 49 U.S.C.A., sec. 911(a)	(1) "Applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of (Part III of the Interstate Commerce Act) and the requirements, rules, and regulations of the (Interstate Commerce) Commission thereunder." (2) "(T)he proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity." 49 U.S.C.A., sec. 909(c).

Limitations on the manner in which and sources from which the Commission may obtain information to warrant the prerequisite findings:

None. The Commission's decision is discretionary. 49 U.S.C.A., sec. 911(a)

Findings must be based on evidence of record obtained under procedural rules applicable fairly in all cases.

Competitors must be given an opportunity to present facts and argument at a hearing through oral and documentary evidence, and to cross examine applicant's witnesses. Administrative procedure Act, sections 5(b), 8(b), 7(c), 5U.S.C.A., sec. 1004 (b), 1007(b), 1006(c). *Pinkett* v. *United States*, 105 F.Supp. 67 (D., Md., 1952)

The scope of the licenses involved. (R. 3-6)

Service is not authorized to the ports cited opposite.

Service is authorized to and from the ports of Anacortes, Astoria, Bellingham, Bradwood, Bremerton, Empire, Everett, Grays Harbor, Kalama, Long Beach, Long View, Mare Island, Marshfield, North Bend, Olympia, Port Angeles, Port Townsend, Prescott, Ranier, Richmond, St. Helens, San Diego, Tacoma, Vancouver, Warrenton, Wauna, Westport, Willapa Harbor, Yaquina Bay, Albany, Bayonne, Bayway, Bridgeport, Brunswick, Camden, Chester, Georgetown, Irvington, Marcus Hook, New London, Newport News, Paulsboro, Port Everglades, Portland, Port Newark, Portsmouth, Poughkeepsie, Providence,

	Savannah, Wilmington, Delaware and Wilmington, N.C.
Service is authorized to and from Miami.	Service is not authorized to Miami.
Service from five Pacific coast ports is limited to only seven Atlantic coast destinations.	Service from the same five Pacific coast ports is authorized to thirty-two Atlantic coast destinations.
Service from two Pacific coast ports is limited to only five Atlantic coast destinations.	Service from the same two Pacific coast ports is authorized to thirty-two Atlantic coast destinations.
Service from four Atlantic coast ports is limited to six Pacific coast destinations.	Service from the same four Atlantic coast ports is authorized to twenty-five Pacific coast destinations.

D. Just as is true of the Ohio Administrative Procedure Act, the Federal Act limits postponement of agency license expirations to the pendency of applications for licenses only of the same type and class of the existing license to be preserved from expiration.

Even though the federal statute, *i.e.,* the third sentence of section 9(b), does not in so many words require that the license application the filing of which preserves another license from expiration be a license of "the same type or class" as the existing license (as does the 1943 Ohio statute), is there reason to believe that this requirement is implicit in,—indeed, is a basic assumption underlying the federal legislation? Perhaps a good way to search for an answer to the question is to explore the meaning with which the federal statute would be endowed by any other interpretation of it.

Assume a temporary license to carry between New York and Washington, and to serve all intermediate points. Is it

preserved from expiration by the licensee's application to carry between Boston and Miami? Perhaps a reasonable re[illegible] would be, yes, because even though the successor license applied for is broader in scope, exercise of the successor licensed privilege, once granted, will include operations which constitute an exercise of the existing licensed privilege. Perhaps the same answer could be given if the successor license were one to carry between Boston and Washington. Suppose, however, the successor license were one to carry between New York and Washington but to serve *no* intermediate points? or one between Boston and Philadelphia? or one between Philadelphia and Baltimore? In other words, suppose the successor application, regardless of how broad its scope, omitted coverage of a part of the operation being conducted under the existing license. Would section 9(b) preserve the existing license from expiration in part? This is actually the case here, where Pan-Atlantic's present license authorizes service at Miami and its permanent license, if granted as sought, will not.

Suppose the existing license between Boston and Washington were via U.S. Highway Number One, and the successor license application sought permission to use the Connecticut and New York parkways, and to use U.S. Highway 40 between Baltimore and Washington? Perhaps the answer might be that the discrepancy between the routes would render the successor activity different from that occurring under the existing license; hence the existing license is not preserved from expiration. However, suppose the route differences were very minor, for instance the substitution of one street for another by which to traverse a small town?

Assume a temporary license to carry "general commodities" between A and B, and an application for a successor license to carry only textiles; or assume the reverse? Assume a temporary license to carry automobiles in so-called drive-

away service, where the carrier employee moves the auto under its own power, and a successor license application to carry automobiles by the "truck-away" method aboard large, highway multiple automobile trailers?

Assume a temporary permit to carry as a common carrier succeeded by an application for a certificate authorizing contract carrier operations? (Compare sections 309 (a) and (f), 302 (d) and (e), 208 and 209, 203 (a) (14) and (15) of the Interstate Commerce Act, 49 U.S.C.A., secs. 909, 902, 308, 309, 303).

Perhaps appellants' reply to these problems is that they are not real, because they have never arisen in spite of the fact that the Commission has extended temporary licenses beyond 180 days for several years in reliance on section 9(b) of the Administrative Procedure Act. Such a reply would ignore the fact that the Commission has heretofore undertaken to exercise its discretion when extending temporary authorities and approvals beyond 180 days and by this measure of control has liminally discouraged attempts by applicants for licenses to extend their existing and temporary operations by filing successor licensing applications. So long as the Commission reserved discretion to refuse an extension beyond 180 days, it was futile to argue concerning whether a temporary authority vested the licensee with some sort of an indefeasible interest.

In the case at bar, however, Pan-Atlantic correctly advises the Court that if the Commission is to prevail, it is because section 9(b) *by operation of law* extends Pan-Atlantic's intercoastal license. The success of such a contention will present the Commission in the future with many problems it had no occasion to deal with in the past, and its solution of those problems can rather confidently be expected to require the testing of litigation and court review. There-

fore, regardless of how real such problems have been in the past, regardless of whether the Commission's regulatory experience indicates a need to resolve them, if the Commission prevails in this appeal those problems will be real in the future and it is very necessary to bear them in mind when exploring the consequence of a proposed interpretation of section 9(b).

The principle sought to be established by appellants will be equally applicable to "temporary approvals" issued under sections 311(b) and 210a(b) of the Interstate Commerce Act, 49 U.S.C.A., sec. 911(b) and 310a(b). *Stone's Express* v. *United States*, 122 F.Supp. 955 (D., Mass., 1954) There also the question of relationship between the existing license and that applied for is a complex one. For example suppose the temporary licensee operating a vendor's properties is only one of several applicants for approval of a purchase of the vendor's properties, or is only an affiliate or subsidiary of the applicants for the permanent permission to purchase?

The facts in the case at bar, of course, do not present these problems in any acute form for decision. However, the question of statutory construction posed by the case at bar must inevitably give rise to them in the future unless the judgment below is affirmed. This is true because the third sentence of section 9(b) is limited to

> "a case in which the licensee has * * * made * * * application for a renewal *or* a new license."

One is left with three choices in interpreting this language: (1) The "application" thus referred to must be for the same license presently held by applicant. (2) The authority sought need bear no relationship to that presently enjoyed by applicant. (3) The successor application must request authority *somewhat* like that presently enjoyed.

The second interpretation invites a chaotic situation which should not be created without the plainest indication of legislative intent requiring it. It is a construction quite at odds with the admonition of section ~~12 of~~ the Administrative Procedure Act, 5 U.S.C.A., 1011 that,

> "Nothing in this Act shall be held to * * * limit or repeal additional requirements imposed by statute or otherwise recognized by law. * * *",

and with the statement by the bill's manager, Senator McCarran, Chairman of the Senate Committee on the Judiciary, made on the Senate floor that,

> "We do not wish to disrupt or change anything that was statutory, and yet we wanted to establish something which would prescribe and define the avenue by which the individual citizen could gain access to a public agency which would touch his private life, and we wished to find for him a way through the procedure."
>
> " * * * (W)e do not interfere with the statute, anywhere in this bill."
>
> U.S. Government Printing Office, *Administrative Procedure Act*, Proceedings in the House of Representatives and in the Senate of the United States (1946), pp. 12, 14.

The third interpretation, of course, would be an extraordinary one—namely that the successor application must request authority somewhat like that presently enjoyed; extraordinary not because it isn't perfectly feasible for the administrative agency to set reasonable bounds to the word "somewhat," but because the statute's prohibition operates as a matter of law and leaves nothing to the agency's discretion. There is no occasion for an agency order empowering the continuance of the temporarily licensed activity beyond 180 days. Hence if we were to accept the "somewhat" con-

struction, it would be up to the individual licensee to decide whether his successor application was for a license sufficiently similar to his existing license to warrant the assumption that the existing license had not expired. The decision would have to be made at the risk of an agency enforcement action or of a criminal prosecution if the licensee decided wrongly. It cannot be suggested that any statutory guide exists concerning the degree or quality of likeness required. As thus construed the statute would be so vague as to distribute justice by, let alone the Commissioner's foot, the size of the applicant's foot.

If the lead to reasonable legislative purpose furnished by the parallel Ohio statutes is viewed as useful, however, it appears that the successor application which the Congress had in mind was an application for a license of "the same type or class * * * of (the) existing license," as noted above. The assumption that these qualifying words are implicit in section 9(b)'s description of the "case" in which an existing license shall not expire avoids the extremes deplored above and the statutory uncertainties which give rise to them. It is also true, however, that such an assumption forbids any conclusion that the Commission could extend Pan-Atlantic's temporary intercoastal license beyond the period provided for in the enabling statute, section 311(a) of the Interstate Commerce Act. Such a conclusion is precluded by the differences between the two certificates involved. They rely on different bases for their grant. One results from a scrutiny much more elaborate than the other. One issues without concern for its effect on the licensee's competitors; the other requires attention to the effect on competitors of a grant of the license sought. One is for a term, warranting no reliance by the licensee on a continuation of the licensed privilege; the other is the equivalent of in fee. And in point of fact one permits limited carriage between a handful of east and west coast ports and the other would authorize service at 57 ports in all. Concededly the

permanent intercoastal certificate which Pan-Atlantic seeks is "somewhat" like the temporary intercoastal permit which it presently has, but they are clearly licenses of different types and classes, and "somewhat like" cannot be compressed into meaning "the same as."

The Appellees suggest that the Court's review in 1940 of its past practice in interpreting statutes is a helpful guide in the case at bar:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results, but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'." (citations omitted)
>
> *United States* v. *American Trucking Associations*, 310 U.S. 534, 543-4, 84 L. ed. 1345, 1351 (1940)

III. Agency interpretations of section 9(b) of the Administrative Procedure Act are not useful guides or precedents to the meaning of its third sentence.

A. The Interstate Commerce Commission's interpretation:

The appellants, however, and especially the Interstate Commerce Commission, suggest countervailing considera-

tions which merit some thought. The first is that the Interstate Commerce Commission for a prolonged period has interpreted section 9(b) of the Administrative Procedure Act as authorizing temporary license extensions beyond 180 days. Such an interpretation by an administrative agency deserves weight, say the appellants, and warrants public reliance which should not be disturbed at a late date in the course of court review.

1. The Commission's original interpretation of section 9(b)'s third sentence was admitted publicly to be a matter of expediency arrived at without assurance of legal accuracy.

This interpretation by the Commission was first made on September 16, 1947 and is a part of the Commission's notices and general orders reported in the Federal Carriers Reporter of Commerce Clearing House, Inc. It may be found in the Statutes and Regulations volume of that service at paragraph 23,040 on page 23,147. This advice to the public by the Commission reads:

TEMPORARY AUTHORITY—DURATION

Interstate Commerce Commission

Notice Issued September 16, 1947

During and immediately following the war, while the Second War Powers Act was in effect, the Commission issued a large number of temporary authorities authorizing motor carrier operations for which there was an immediate and urgent need. These temporary authorities continued until March 31, 1947, when the Second War Powers Act expired. In order to enable the continuance of needed services, temporary authorities expiring September 27, 1947, were issued to a large number of carriers. Many of the carriers to whom these authorities were issued filed applications for certificates of public convenience and necessity or permits to continue the operations performed under temporary au-

thority. Many of these applications for certificates and permits have been decided but all of the certificates and permits authorized have not been issued as the period within which protestants may file petitions for rehearing, reargument, or reconsideration has not expired. Owing to the large number of these applications, plus the applications filed as the result of the post-war changes in commerce and industry, the Commission could not determine all of them by September 27, 1947, the expiration date of the temporary authorities.

Consideration has been given by Division 5 of the Commission to the question whether the operations conducted under temporary authorities, issued for a period of 180 days, expiring September 27, 1947, may be continued after September 27, 1947, where timely filed applications for certificates or permits covering generally the same operations have been filed, but have not been finally determined. There is a divergence of legal opinion on the question. Some of the Commission's lawyers are of the opinion that an extension is authorized by Section 210a(a) of the Interstate Commerce Act; others are of the opinion that continuances of such operations are authorized by Section 9(b) of the Administrative Procedure Act; while others doubt that either Section 9(b) of the Administrative Procedure Act or Section 210a(a) of the Interstate Commerce Act or any other provision, either extends or authorizes the Commission to extend, these temporary authorities where they have been in effect for 180 days subsequent to March 31, 1947.

Under the circumstances, and because it appears that the public interest would suffer from a termination of the motor carrier services being conducted under the temporary authorities, Division 5 of the Commission has concluded to authorize the carriers to continue the services authorized by temporary authorities until further order of the Commission, but not beyond the time the corresponding certificate or permit applications have been finally determined either by a denial of an application or by the issuance of a certificate or permit.

The Commission's annual reports to the Congress evidence a continued concern whether the Commission's interpretation of section 9(b) above described was correct. This concern was warranted because, as the Commission noted at page 122 of its Sixtieth Annual Report for 1946, with the expiration of the Second War Powers Act it would lose its emergency powers to license motor and water carriers on a temporary basis. It desired to obtain such powers on the same basis which empowered it to regulate car service among railroads. A review of the Commission's car service powers, section 1 (10)-(17) of the Interstate Commerce Act, 49 U.S.C.A., sec. 1 (10)-(17), reveals that they are in no way limited to periods of 180 days or of any other fixed length in their exercise.

> "11. We recommend that this Commission be given permanent emergency powers with respect to service by motor carriers and water carriers such as it now has with respect to car service by rail carriers. We now have such power temporarily over motor carriers under the Second War Powers Act, which will expire March 31, 1947, or earlier."
>
> *Sixtieth Annual Report of the I.C.C.*, p. 122 (United States Government Printing Office, 1946)

2. The Commission has requested Congress to enact amendments to the Interstate Commerce Act which would be unnecessary if section 9(b) of the Administrative Procedure Act meant what the Commission says it does.

The Administrative Procedure Act [including section 9(b)] became law by the act of June 11, 1946, c. 324, 60 Stat. 237. In spite of that fact, and in spite of the Commission's interpretation of that act published September 16, 1947 and quoted above, the Commission's 61st Annual Report dated November 1, 1947 made the request,

> "10. That this Commission be given emergency powers with respect to service by motor carriers and water carriers such as it now has with respect to car service by rail carriers."

In spite of these requests the amendment of section 1501 of the Second War Powers Act on June 29, 1946, c. 526, sec. 1, 60 Stat. 345 restored to sections 210a and 311 of the Interstate Commerce Act the provisos which limited the Commission's emergency powers to 180 days.

The Commission remained disturbed about the matter and in 1955, p. 132 of its Sixty-Ninth Annual Report advised:

> "20. We recommend that section 210a(a) and (b) be amended so as to authorize the Commission to grant temporary authorities and temporary approvals beyond a period of 180 days."

This request undoubtedly was occasioned by the decision in *Stone's Express* v. *United States*, 122 F.Supp. 955 (D., Mass.) which was published May 25, 1954. However, whatever may have been the Commission's concern to preserve its power to extend temporary motor carrier licenses under Part II of the Interstate Commerce Act, 49 U.S.C.A., 301, *et seq.*, the Commission's regulatory problems did not require a like request with respect to water carriers until 1956 when it stated at p. 166 of its Seventieth Annual Report.

> "12. We recommend that section 210a(a) and (b) and section 311(a) and (b) be amended so as to authorize the Commission to grant temporary authorities and temporary approvals beyond a period of 180 days."

This is quite at variance with *United States* v. *American Trucking Associations*, 310 U.S. 534, 549, 84 L. ed. 1345, 1354 (1940) cited in the Commission's brief, p. 30 and Pan-Atlantic's at p. 38, where the Court said,

"Furthermore, the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provision's enactment to Congress."

3. The Commission's rules, based on its interpretation of section 9(b) reserve, to the Commission a discretion to cancel temporary licenses which is inconsistent with the only meaning section 9(b) can have if it is applicable to temporary licenses.

Is it reasonable to give weight to the Commission's construction of section 9(b) when that construction has resulted in the publication of the rules set forth in Appendix D of Pan-Atlantic's brief, p. 13a, and when section 2.4 of those rules attempts to reserve discretion to the Commission quite beyond any enabling effect of section 9(b)'s third sentence? Compare

"Nothing in these rules shall be construed as preventing the Commission from terminating at any time, in accordance with law, any temporary authority or approval, or any extension thereof under Section 9(b) of the Administrative Procedure Act (5 U.S.C. 1008(b))."

with

"In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, *no license* with reference to any activity of a continuing nature *shall expire* until such application shall have been finally determined by the agency."

Administrative Procedure Act, section 9(b), 5 U.S.C.A. 1008(b).

Therefore, the Commission's interpretation of the statute is not entitled to weight because: (1) The Commission's

notification to the public of that interpretation indicated it was arrived at as a matter of expediency and in the face of staff dissent so serious and so well-reasoned as to require inclusion of that dissent in the public notice. (2) The Commission's requests to Congress for further legislation indicate no confidence in its own interpretation of the statute and those requests have met with no response. (3) The Commission's interpretation as set forth in its rules quoted above is at variance with the meaning of the statute, and there is indication that the Commission would deplore any result which would deprive it of the power of terminating temporary licenses "at any time, in accordance with law"; yet such must be the result if the Commission were to succeed as appellant here.

It might be suggested that, the third sentence of section 9(b) to the contrary not-with-standing, the second sentence of that section preserves to the Commission the power to cancel temporary licenses, hence the freedom to refrain from extending them beyond 180 days. In this regard it is troublesome that, as the Commission stated in its brief to the trial court below (p. 14),

> "Both the Senate and the House Judiciary Committees in their reports on the bill which became the Administrative Procedure Act, in commenting on section 9(b) expressed the view that the *second* sentence of that subsection would not apply to temporary authorities. (Legis. His. A.P.A. p. 212 and 275). The Attorney General, in his letter of October 19, 1945, to the Chairman of the Senate Judiciary Committee stated, "The second sentence of subsection (b) is not intended to apply to temporary licenses which may be issued pending the determination of applications for licenses."

Recalling the review of section 9(b) set forth at the beginning of this brief, it would be understandable had the Congressional committees and the Attorney General assumed

that *a fortiori* the *third* sentence of section 9(b) would be read as inapplicable to temporary licenses. However, the Commission's contention below was that the mandatory nature of section 9(b)'s third sentence was not at variance with Rule 2.4 of the Commission's rules quoted above, because, "The language 'shall not expire' merely inhibits the expiration, not the enforcement of regulatory requirements."

This conclusion that what is granted by section 9(b)'s third sentence is withdrawn by the section's second sentence (or other statutory cancellation powers) certainly offers poor protection to the "individual citizen" for which the Congress "wanted to establish something which would prescribe and define, the avenue by which (he) could gain access to a public agency which would touch his private life, and we wished to find for him a way through the procedure." (U.S. Government Printing Office, *Administrative Procedure Act*, *op. cit.*, p. 12) It seems to us inescapably plain that the purpose underlying section 9(b)'s third sentence was to guard the citizen against agency dalliance and against an arbitrary withholding of agency action which could cause a term license to expire solely because of agency failure to put in process the normal procedures for its renewal. The Commission's suggestion that, nonetheless, such a license may be cancelled at will, at least so long as it is a temporary one, withdraws from at the same time it extends to temporary licensees the only protection which gives the statute *raison d'etre*.

The appellees have therefore concluded and now urge that the Commission's interpretation of the statute has been so tentative and gives birth to such conflicts that, whatever else may be said for, against or about it, it is not entitled to weight in the course of this Court's deliberations.

B. The Civil Aeronautics Board has not interpreted section 9(b) of the Administrative Procedure Act as

postponing expiration of discretionary exemptions under section 416(b) of the Civil Aeronautics Act pending determination of CAB certification applications.

The Commission cites not only its own interpretation of section 9(b) of the Administrative Procedure Act as reason for reversing the judgment below, but also that of the Civil Aeronautics Board under section 416(b) of the Civil Aeronautics Act, 49 U.S.C.A., sec. 496(b). The C.A.B.'s interpretation is said to be indicated by Part 290, Title 14 of the Code of Federal Regulations.

We concede that Part 290 of 14 C.F.R. agrees with the meaning which the Interstate Commerce Commission assigns to the words "of a continuing nature" in section 9(b) of the Administrative Procedure Act, 5 U.S.C.A., sec. 1008(b). Both agencies evidently deny that activity of a continuing nature is merely a more general statement of the activity described in the Ohio legislation as "engaging in a business or profession." The appellees disagree for the reasons abovestated, but regardless of that contention, we do not understand the Civil Aeronautics Board to believe itself endowed with the power to extend temporary licenses the duration of which is limited by law, during the pendency of a permanent certification proceeding. In point of fact, section 416(b) of the Civil Aeronautics Act, 49 U.S.C.A., sec. 496(b), which provides for exemption of carriers from the certification provisions of the act, places no limitation whatsoever on what may be the maximum term of such an exemption.

Moreover in *Eastern Airlines* v. *Civil Aeronautics Board*, 185 F. 2d 426 (App., D. C., 1950) the Court of Appeals was asked to vacate a CAB order exempting Capital Airlines, Inc. under section 416(b) of the Civil Aeronautics Act, and thus licensing it through a "letter of registration" to conduct air carrier operations as a non-certificated carrier. The original

such exemption order was entered by the Board on September 27, 1948 and was limited to a term of one year. On October 24, 1949 the temporary license was extended for six months. Prior to the expiration of that six months, on November 23, 1949 the licensee applied for a certificate of public convenience and necessity authorizing the operations then being conducted under the temporary license. The Court's decision concerning vacation of the CAB's temporary licensing order of October 24, 1949 was made on October 23, 1950. It does not indicate whether Capital's application for a certificate was still pending at the time of the decision or even on April 24, 1950 when the term of the second temporary license expired. The Court's decision was to affirm the CAB's order, but it included the following observation:

> "Since *the exemption order, and its successor, have expired by their own terms,* we might dismiss the petition for review as moot. But judicial decision of important questions that are likely to recur should not be 'defeated, by short-terms orders, (sic), capable of repetition, yet evading review'." (185 F. 2d at 427, emphasis supplied.)

In 1951 this Court vacated the judgment below and remanded the case to the Court of Appeals with directions to dismiss the suit as moot. *Eastern Airlines* v. *Civil Aeronautics Board,* 341 U.S. 901, 95 L. ed. 1341 (1951)

It is true that no suggestion appears to have been made either to the Court of Appeals or to this Court that by virtue of the third sentence of section 9(b) of the Administrative Procedure Act the temporary license in question was preserved from expiration during the pendency of Capital's certification application. We do not contend therefore that either *Eastern Airlines* v. *Civil Aeronautics Board,* 185 F. 2d 426 or *Civil Aeronautics Board* v. *American Air Transport,* 201 F. 2d 189 (App., D. C., 1952), a case with somewhat

similar implications, constitute precedentially useful decisions concerning the meaning of section 9(b)'s third sentence, but the position taken by the Civil Aeronautics Board in each certainly seems inconsistent with the views imputed to the Board by the Interstate Commerce Commission herein.

IV. The contention that the agency has administrative need for the power to extend temporary licenses during the pendency of permanent certification proceedings:

A. Interstate Commerce Commission temporary operating authorities are not issued on the basis of *evidence* of an urgent and immediate need, and there is no evidence of such a need in the record herein.

Next the Commission invites the Court's attention to the urgency of the need for the type of regulatory power which has been assumed under the aegis of section 9(b), and to the frequency with which it has been exercised in the past. The Commission points out that,

> "Where the *evidence* indicates an immediate and urgent need for a definite period which is less than 180 days, the Commission grants temporary authority for the period of the need and the operation is not regarded as of a continuing nature beyond that period, within the meaning of section 9(b). Where it appears that the need will continue for an indefinite time, at least beyond 180 days, temporary authority is granted for the maximum period of 180 days."
>
> (I.C.C. brief, p. 11)

Pan-Atlantic supplements this by advising the Court in its brief, pp. 6-7, that Pan-Atlantic's application for the temporary license which it now has (hence, presumably the Commission order granting that license) was "in response

to an urgent and immediate public need" for such water carrier transportation. Then Pan-Atlantic remarks that the Commission's findings in support of the grant of temporary authority included one that the service thus authorized "was contained within the scope of the application of Pan-Atlantic for a permanent certificate."

The sort of error which can creep into deliberations concerning this matter is illustrated by the foregoing statements by the appellants—statements undoubtedly made in good conscience which, none-the-less, misrepresent important aspects of section 311(a) of the Interstate Commerce Act enabling issuance of temporary authorities. We disagree with the Commission that temporary licenses are issued on the basis of what "evidence" may "indicate" to be true. As pointed out above, they are issued according to the agency's discretion, without hearing, without the testing of cross-examination, without opportunity to competitors, much less to introduce evidence in opposition, even to marshal the facts in opposition and adequately to prepare a statement concerning them because action on temporary licensing applications necessarily must be taken rapidly and entirely at the agency's discretion. *Kansas City & Leavenworth Transp. Co.* v. *United States,* 51 F.Supp. 916 (D., Del., 1943)*; *Schenley Distillers Corporation* v. *United States,* 50 F.Supp. 491 (D., Del., 1943); *Hudson River Day Line* v. *United States,* 85 F. Supp. 225 (S. D., N. Y., 1949); *Baltimore Transfer Co.* v.

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* This case, cited by both appellants for the proposition that the Commission's temporary licensing powers were enacted to hold the line, as it were, pending the outcome of permanent license proceedings, (Pan-Atlantic brief, p. 23, I.C.C. brief, p. 12) has nothing to do with that question in any contemporary context, because it concerned a temporary license issued and then outstanding while the 180 day limitation had been suspended from operation by wartime legislation. Consequently the court was at liberty to view sections 210a (a) and 311 (a) of the Interstate Commerce Act in a broader policy context and certainly without any reference to section 9(b) of the Administrative Procedure Act, which latter is the only statute a question concerning the construction of which is presented by the case at bar.

Interstate Commerce Commission, 114 F.Supp. 558 (D., Md., 1953), aff'd. 346 U.S. 890, 98 L. ed. 394 (1953); and *Bowen Transports* v. *United States,* 116 F.Supp. 115, 118, note 2 (E. D., Ill., 1953). Temporary licenses, at least by the Interstate Commerce Commission, may not fairly be said to issue "where *evidence* indicates an immediate and urgent need" (although of course the agency undoubtedly is satisfied from the limited information at its disposal that such a need exists). Likewise we disagree with Pan-Atlantic that its temporary authority application was filed in response to an urgent and immediate need. Inasmuch as the record is silent entirely on the matter we are not at liberty to state the reasons for our disagreement, but certainly such an assertion cannot be allowed to pass without protest. And in the course of discussing what is and what is not "evidence" in the case at bar, it should be noted that the Commission did not find that Pan-Atlantic's service under the temporary license "was contained within the scope" of its pending application for permanent authority, at the time the Commission extended the temporary certificate. The Commission's finding concerning the temporary service was:

> "That this service *corresponds in part* with that which the carrier by application No. W-376 (Sub-No. 13) seeks a certificate of public convenience and necessity; (sic)" R. 14, Exhibit 17)

B. More than half of the temporary licenses issued by the Commission under section 210a (b) of the Interstate Commerce Act which have been extended beyond 180 days have remained outstanding for periods exceeding three times the statutory period.

The Commission's brief, p. 29, cites a total of 10,776 temporary licenses to carry which have been issued during the five years ending January 1, 1957, and a total of 2,052 such licenses which have been extended beyond 180 days during

that period. We have no way of checking the accuracy of these statements because this information is not of record, but there is every reason to believe the information is correct because it is evidently based on the Commission's annual reports to Congress, and these in turn contain tabulations of Commission regulatory activity which may be presumed to be accurate. These figures, however, omit a detail which is very important in determining the economic and regulatory significance of the Commission's assumption of power to extend regulatory licenses beyond 180 days, namely, the duration of such extensions. If the average such duration is only a month beyond 180 days, or even if it is only twice the 180 day period it might be possible to urge that the policy of the Congress underlying the temporary licensing enabling provisions in the Interstate Commerce Act is not being frustrated.

It will be recalled that the Congress established a clearly and unambiguously stated limit of six months (180 days) on all Part II and Part III temporary licenses which issue without reception of evidence, without hearings, without reports on the Commission decisions involved, and without adequate opportunity to competitors to make their objections known. See sections 210a (a) and (b) and 311 (a) and (b) of the act, 49 U.S.C.A., 310a (a) and (b) and 911 (a) and (b). This limitation is so unquestioned and unquestionable that there is no suggestion in this case of a Commission power to issue a "renewal" 180 day license, or that Pan-Atlantic's request for extension of its temporary intercoastal authority constituted an "application" during the pendency of which its original 180 day license was preserved from expiration by section 9(b) of the Administrative Procedure Act. Very likely the provisions of section 9(b) do preserve a 180 day license from expiration under the Interstate Commerce Act pending the outcome of an application for its renewal. This proposition, however, is

relatively functionless, because it is quite clear that by the terms of the Interstate Commerce Act, unaided by other legislation, the Commission lacks the power to renew a 180 day license, at least so long as it relies for its basis on the same "need" which gave rise to its issuance in the first instance. Thus no such renewal application could reasonably be expected to remain pending for any considerable length of time because the Commission would deny it out of hand as being clearly beyond the Commission's power to entertain. In any event, the pendency of such a renewal of a 180 day license is not being urged as a basis for decision in the case at bar because in point of fact no such application was filed. (R. 6, par. 9; R. 11, Exhibit 15) The only application, in the "case" of the filing of which it is practical to urge the continuation of a temporary license is an application to make permanent the operation which has theretofore been conducted on a temporary basis.

Why did the Congress establish a limit of 180 days for the duration of temporary licenses under the Interstate Commerce Act? The foregoing explanation of sections 309 and 311 of the Interstate Commerce Act, 49 U.S.C.A., secs. 909 and 911, and of the provisions of the Administrative Procedure Act which are applicable according to *Pinkett* v. *United States,* 105 F.Supp. 67 (D., Md., 1952) accounts for the matter. Section 309 licenses (and section 5 licenses, 49 U.S.C.A., sec. 5) issue only after opportunity for careful scrutiny by the Commission into the economic need for and effect of the authorization sought by the applicant, an opportunity which is not afforded by procedures under sections 311 and 210a, 49 U.S.C.A., secs. 911 and 310a.

Further explanation of the Congressional policy involved is supplied by objections voiced by motor carrier interests when section 210a of the Interstate Commerce Act was proposed by H.R. 9737 and S. 3606, 75th Congress, 3rd Session, on the ground that a grant of temporary authority could be

used by an applicant for permanent authority to circumvent the traditional burden of proof required to be borne by such an applicant. To allay these fears, Commissioner Eastman, the Commission's spokesman before the Congress at that time, wrote the Subcommittee of the House Committee on Interstate and Foreign Commerce,

> " * * * (A)nd in any event the authority granted would be strictly limited in time by the proposed amendment."
>
> (Hearings before Subcommittee of the Committee on Interstate and Foreign Commerce on H.R. 9737, 75th Cong., 3rd Sess., pp. 11-12).

In Document No. 154 appended to the record of these hearings Commissioner Eastman expanded on these views:

> "The act now contains no provision enabling us speedily to grant temporary operating authority to meet an emergency, pending such formal determination of the matter. We believe that we should have power to make such temporary grants. * * * However, the Commission should be capable of using the power with proper discretion *and in any event the authority granted would be strictly limited in time by the terms* of the proposed amendment." (emphasis supplied)

In his testimony before the Senate Subcommittee on Interstate Commerce, Commissioner Eastman said,

> " * * * (A)nd furthermore the temporary authority can be granted only for a period of not more than 180 days."
>
> (Hearings before Senate Subcommittee on Interstate Commerce on S. 3606, 75th Cong., 3rd Sess., p. 20)

As stated above, the statistical review presented in the Commission's brief, while it indicates that the Commission has had significant resort to its alleged power under section 9(b) of the Administrative Procedure Act to extend Inter-

state Commerce Act temporary licenses, does not indicate the extent to which such resort has caused these licenses significantly to exceed the statutory limitation urged by Commissioner Eastman as the safeguard which warranted enactment of the language in question.

Transportation Research, Inc. of Washington, D. C. (more familiarly known in the trade as "TRINC") publishes quarterly and annual reviews of all Class I motor carrier financial reports filed with the Interstate Commerce Commission. Until the third supplement for the years 1954-1953 this publication was entitled "Manual of Highway Carriers—Class I Freight." Since then it has been entitled "Comparative Financial and Operating Record, Class I Motor Freight Carriers." These publications in each issue have included the I.C.C. docket numbers of all unification of control applications filed with the Commission under section 5 of the Interstate Commerce Act, 49 U.S.C.A., sec. 5, in the course of which the Commission has issued a temporary license authorizing an applicant to control another carrier under section 210a (b) of the act, 49 U.S.C.A., sec. 310a (b), and then extended that license beyond a period of 180 days for the pendency of the permanent control application which gave rise to the temporary license. Information on such temporary license extensions as published by TRINC is limited to licenses issued to licensees who are Class I motor carriers, and is also limited because there are four sections of the Interstate Commerce Act enabling the issuance of temporary licenses, namely sections 210a (a) and (b) and 311 (a) and (b), 49 U.S.C.A., sec. 310a (a) and (b), and 911 (a) and (b), whereas the TRINC information is confined to extension of section 210a (b) licenses only. Furthermore, the railroad appellees have no way of knowing how exhaustive and accurate TRINC's review is even of the limited area of I.C.C. regulatory activity which it purports to report.

Because, however, the opinion below (R. 31 and 144 F.Supp. 53) indicates that, if section 9(b) of the Administrative Procedure Act authorizes temporary license extensions, it does so with respect to the other three enabling sections of the Interstate Commerce Act as well as for section 210a (a), and because the information tendered in appellants' briefs provides no basis on which to estimate the economic significance of such license extensions in terms of their duration, we have abstracted all the relevant I.C.C. docket numbers from TRINC's publications covering the period between January 1, 1952 and September 30, 1956 and have physically reviewed the records of those proceedings in the Commission's public docket room in Washington to determine for each the date of the order granting the temporary control license in the docket, the fact of that license's extension beyond 180 days, and the date of final order in the permanent control proceeding under section 5 of the Interstate Commerce Act, 49 U.S.C.A., sec. 5, which, by the terms of the temporary license extension, brought the temporary license to an end.

From January 1, 1952 until September 30, 1956 TRINC reported 1,409 Commission orders in so-called finance dockets, i.e., proceedings under section 5 of the Interstate Commerce Act. Of these 84 recited that the only circumstance giving rise to them was a desire by the applicant corporation to change its name. Thus there was left a net total of 1,325 functional orders for this period. Of these:

1,030)		(Permanent orders.
194)	were	(180 day licensing orders.
101)		(Orders extending 180 day licenses.

Of the 101 extensions reported by TRINC, our review of the dockets revealed two to be erroneous reports (dockets MC F 5565 and MC F 5527). At the time we made our re-

view 7 dockets were unavailable for inspection in the Commission's public reference room (March 12, 1957). The remaining 92 dockets (of the 101 containing orders extending 180 day licenses) are tabulated in appendix A to this brief. Those marked with an asterisk were dockets wherein the permanent authority application remained undecided on March 12, 1957, hence where the extended temporary license was still effective. The elapsed time figures set forth in the appendix were computed from the effective date of the original order granting a 180 day license until the effective date of a final order granting or denying the connected permanent authority proceeding, or, where no such final order had been entered, until March 12, 1957.

It will be noted that only 12 temporary licenses in the appendix expired in less than one year, i.e., after they had been extended beyond the statutory period only 12 of the 92 failed to extend more than twice as long as the statutory period. Two of them, dockets MC F 5407 and MC F 4819, have been outstanding for four years and no final order in MC F 5407 had been entered March 12, 1957. Six licenses are three years or more old, or more than six times the statutory period. Twenty-eight are two or more years old, or more than four times the statutory period. Fifty licenses extended beyond 180 days have been operative for periods in excess of eighteen months, or three times the statutory period. The portion of temporary licenses thus exceeding three times the statutory period constitutes 54% of the 92 licenses reviewed.

C. Temporary licenses outstanding for prolonged periods of time produce competitive changes as profound as permanent licenses; yet they are issuable *ex parte* and without any regard to their competitive effects.

In evaluating this information the mechanics of I.C.C. licensing proceedings should be borne in mind. Because of

its budgetary limitations the Commission is required extensively to rely on adversary proceedings to uncover information as to whether an applicant for a license meets the Commission's standards of fitness, and to determine whether the area of service involved is already so saturated with outstanding licenses and competing operations that the authorization of a new one will serve merely to fragment the available traffic further and weaken the individual elements of the carrier industry which are at the present providing service. Carrier operations, and especially rail and water carrier operations, require extensive capital investment, and a loss of traffic to a newly licensed competitor cannot often be compensated for by a proportionate reduction in carrier costs for the enterprise from which the traffic is diverted, because of the high ratio of fixed to variable costs in the business. The inevitable result is either a serious reduction in service or increased charges assessed against the remaining traffic; more frequently both results ensue. This in turn and for a time accelerates traffic diversion to the new carrier until a new balance is reached dictated by the limits of the new carrier's available investment and its service area. The Commission must bear such possibilities in mind when deciding upon license applications, and it often gives them exhaustive consideration. A classic case in which it has done so is *Pacific Inter-Mountain Express Co.—Control and Purchase—Keeshin*, 57 M.C.C. 341, 380 (1952). See also:

Von Der Ahe Van Lines, Inc.—Purchase—Swormstedt Storage, 60 M.C.C. 609, 610 (Div. 4, 1954)

Rudolph Motor Service, Inc.—Purchase—Dorre Truck. Corp., 60 M.C.C. 71, 84 (Div. 4, 1954)

Bowman—Purchase—Brown, 38 M.C.C. 783 (Div. 4, 1943)

Shein's Express—Purchase—Central Jersey Motor Lines, Inc., 59 M.C.C. 534, 548 (1953)

Liberty Motor Freight Lines, Inc.—Purchase—William Guy Tumbleson, 59 M.C.C. 581 (Div. 4, 1953)

Chippewa Motor Freight, Inc.—Purchase—Ernest Robert Koepp, 60 M.C.C. 44 (Div. 4, 1954)

L. Nelson & Sons Transp. Co.—Purchase—White's Exp:, 59 M.C.C. 675, 680 (Div. 4, 1953)

Robert E. Paup Common Carrier Application, 63 M.C.C. 139, 142 (1954)

Hancock Trucking, Inc., Extension, 62 M.C.C. 513 (1954)

West Bros., Extension—Pensacola, 68 M.C.C. 95, 103 (Div. 1, 1956)

Halls Motor Transit Co., Extension—Curtiss, 68 M.C.C. 231, 236 (Div. 1, 1956)

In making determinations such as these it is easy to understand not only that these applications attracted the adverse attention of applicant's competitors, but also that the Commission was materially assisted in reaching its decision by the facts brought to light through the conflict of adversary interests in the hearing room and on brief. However, no such disclosure through adversary proceedings is possible in the course of temporary licensing. On the other hand, the exercise of even temporary privileges to compete in a given area for a period in excess of 18 months can gel the competitive situation and can also do almost the same damage that would have been done by improvident issuance of a permanent license.

A temporary license exercised over a prolonged period of time also can have its effect on the way a permanent license application will look to the Commission when it reaches the point of ultimate decision on the matter. This is plain from *Watson Bros. Transportation Co., Inc., Extension—Dangerous Explosives*, 53 M.C.C. 1, 3 (Div. 5, 1951) where the Division, in granting the license, said,

"Applicant has been performing the proposed operations under temporary authority since 1949, and while

past operations under temporary authority are not conclusive of a public need for the proposed service they are entitled to some weight. It is true that no shippers or public witnesses appeared in support of the application. Instead applicant relies upon the contribution to public safety which would result from the proposed operations as a basis for the granting of the authority requested.

"In the circumstances, we think a finding that public convenience and necessity require the proposed operations has been justified. * * *"

However, the dissent of Commissioner Lee in that case indicates the possibility that the temporary operations were of determinative influence on the decision:

"The record contains no evidence of need for the service here proposed by applicant. Section 210a(a) of the Act expressly provides that the granting of the temporary authority shall create no presumption that corresponding permanent authority will be granted thereafter. In my opinion, the evidence does not support the finding that public convenience and necessity require the operation by applicant for which authority is here granted." 53 M.C.C. at 4

D. When empowering the Commission to issue temporary licenses Congress acted on the assurance that they must terminate within six months; if Congress had thought the Commission needed more than six months to process permanent certification applications, additional limitations would have been imposed on the Commission's temporary licensing powers before enlarging them to include licenses good for more than six months.

A question posed by the case at bar is whether when enacting the Administrative Procedure Act and subsequently reimposing the 180-day limitation on I.C.C. temporary licens-

ing power through amendment of the Second War Powers Act the Congress intended to create a new method by which carrier licenses would come into being in such a manner as to alter the competitive situation before the Commission ever had an opportunity to look into the matter through its formal procedures. The facts set forth in Appendix A indicate that this is what is happening today. We believe it is most unlikely that the Congress had any such situation in contemplation when enacting the legislation in question, and to the contrary the legislative history both of the Administrative Procedure Act and of the Interstate Commerce Act reviewed above points in quite another direction. So far as the Administrative Procedure Act is concerned, in enacting the third sentence of section 9(b) the Congress desired to preserve licenses in effect during the process of their *renewal*, and in circumstances when their periodic renewal is a statutory necessity (and *a fortiori* is a statutory possibility). And when endowing the Commission with temporary licensing powers under section 210a and 311 of the Interstate Commerce Act, 49 U.S.C.A., sec. 310a and 911, the Congress acted on the explicit assurance that such powers would not result in a change in the competitive picture unheralded by formal Commission investigation for a period longer than six months. Very likely the Congress hoped and expected that the *average* such period would be a good deal less than six months.

It is, of course, possible for the Congress to provide for a longer period. It would also seem appropriate to provide as well for a preferred position on the Commission's dockets of situations thus marked by temporary licensing. Perhaps as well the Congress might consider the establishment of an emergency investigation procedure which should precede temporary licensing for periods of more than six months. It is ill advised, however, to ask this Court to endow the Commission with temporary licensing power in excess of

six months in the absence of such safeguards, and this is what appellants seek in the case at bar.

The Commission's brief at p. 13, evidently as a basis for supporting the Commission's position concerning the meaning of section 9(b) of the Administrative Procedure Act, tenders the observation,

> "At the time section 210a was enacted, it was thought that a period of 180 days would be sufficient time within which to determine applications for certificates and permits. The same thought was followed when section 311 was enacted. It developed, however, that some proceedings could not be determined within that time, particularly contested applications involving extensive operations, of which the present application of Pan-Atlantic may be cited as an example."

The implication is that the Congress when enacting sections 210a and 311 desired to give the Commission whatever time it needed to get permanent applications out of the way; therefore this Court should implement that legislative policy by interpreting the Administrative Procedure Act in such a way as to preserve to the Commission whatever room it needs for maneuver. This desire by the agency involved is understandable, perhaps even praiseworthy. The factual premise from which the argument proceeds, namely what Congress desired, is debatable, however. As noted above, operations under the aegis of temporary license are quite different things from operations authorized after formal Commission review. Commissioner Eastman was able to obtain Congressional authority for the Commission to license temporary operations in a summary and *ex parte* proceeding only on the basis of the frequently reiterated assurance that they would persist for no more than six months. Not only is there no evidence in the legislative history warranting the conclusion that the Congress desired to enable temporary licensing during the pendency the permanent license appli-

cation proceedings *regardless of the duration of the latter*, but also that history does contain assurances that, without regard to the duration of the permanent authority proceeding, the temporary licensing power would not extend beyond six months per license. It is not unreasonable to suspect, at least, that the Congress relied on these assurances in enacting the enabling legislation. It is the contention of appellants that the question whether such licensing power is to be enlarged is not a matter of detail or of mechanics, that it includes within it serious questions of policy-making, that it was never decided in 1946 when the Administrative Procedure Act became law, and that the place for its decision is the Congress and not this Court. If it be true (and it is by no means clear that preferential docketing could not speed up licensing applications connected with temporarily licensed activity) that six months is too short a time within which to attempt to handle licensing applications under the Interstate Commerce Act, one is reminded of Judge Learned Hand's observations concerning the analogous situation arising in *Fishgold* v. *Sullivan Drydock & Repair Corporation*, 154 F. 2d 785, 788-9 (2 Cir., 1946), aff'd. 328 U.S. 275, 90 L. ed. 1230, 167 A.L.R. 110 (1946):

> "When we consider the situation at the time that the Act was passed—September, 1940—it is extremely improbable that Congress should have meant to grant any broader privilege than as we are measuring it. It is true that the nation had become deeply disturbed at its defenseless position, and had begun to make ready; but it was not at war, and the issue still hung in the balance whether it ever would be at war. If we carry ourselves back to that summer and autumn, we shall recall that the presidential campaigns of both parties avoided commitment upon that question, and that each candidate particularly insisted that no troops should be sent overseas. The original act limited service to one year, and it was most improbable that within that time we should be called upon to fight upon our own soil; as indeed the event proved, for we were still at peace in September,

> 1941. Congress was calling young men to the colors to give them an adequate preparation for our defense, but with no forecast of the appalling experiences which they were later to undergo. Against that background it is not likely that a proposal would then have been accepted which gave industrial priority, regardless of their length of employment, to unmarried men—for the most part under thirty—over men in the thirties, forties, or fifties, who had wives and children dependent upon them. Today, in the light of what has happened, the privilege then granted may appear an altogether inadequate equivalent for their services; *but we have not to decide what is now proper;* we are to reconstruct, as best we may, what was the purpose of Congress when it used the words in which sec. 8(b) and sec. 8(c) were cast." (emphasis supplied)

It is the appellees' suggestion that what the Court has to decide is not what sort of temporary licensing powers would be appropriate to the Commission's needs, but what powers the Congress deemed to be appropriate to those needs in 1938 when section 210a of the Interstate Commerce Act was enacted, and in 1940 when section 311 became law, 49 U.S.C.A., sec. 310a and 911; what powers the Congress thought appropriate when by amending the Second War Powers Act on June 29, 1946, c. 526, sec. 1, 60 Stat. 345 it reimposed the 180 day limitation on the Commission; what powers the Congress thought it was creating on June 11, 1946 when it enacted the Administrative Procedure Act, c. 324, 60 Stat. 237, 5 U.S.C.A., sec. 1001 *et seq.* and included in it the words:

> "Nothing in this Act shall be held to * * * limit or repeal additional requirements imposed by statute or otherwise recognized by law. * * *"
>
> Section 12, Construction and Effect., Admin. Procedure Act. 5 U.S.C.A., sec. 1011
>
> and
>
> "(a) In General.—No sanction shall be imposed or substantive rule *or order* issued except within jurisdiction delegated to the agency and as authorized by law."

Section 9. Administrative Procedure Act, 5 U.S.C.A., sec. 1008.

V. The court below did not err in relying solely on *stare decisis* as a basis for decision. *Radovich* v. *National Football League* U.S. , 25 Law Week 4152 (1957); *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953)

In addition to arguments of appellants discussed above, the appellant Pan-Atlantic makes two further contentions which require mention. The first is that the court below erred because two of its three members indicated that, were the case *res integra*, they would have dismissed the complaint. It should be noted that Circuit Judge Magruder gave no indication that such was his view of the matter. However, this contention by Pan-Atlantic appears to be based on the proposition that there are criteria of proper judicial behavior which forbid reliance on the rule of *stare decisis* as the *sole* basis for decision. We assume, and we are sure rightly, that this Court's judicial behavior is an appropriate guide for the Federal District Courts. This Court has already indicated that in appropriate circumstances it is judicially proper both entirely to ignore the rule of *stare decisis* and to place sole reliance upon it, *Radovich* v. *National Football League*, U.S. , 25 Law Week 4152 (1957), regardless of what a tribunal's resolution of the subject controversy would be were it *res integra*.

VI. A requirement that a temporary license issue before a successor application is filed, if the pendency of the application is to suspend expiration of the license, does not delay the filing of certification applications, because by its rules the agency can require their "timely" filing to be an early one.

Pan-Atlantic also suggests that a decision which vacated Pan-Atlantic's temporary authority on the ground that it

was not a licensee at the time it applied for permanent authority would encourage postponement of permanent authority applications until after issuance of the temporary license; hence would frustrate any attempt by the Commission to speed the processing of such permanent authority applications. (Pan-Atlantic brief, pp. 16-17) It is our contention that the type of licensing to which section 9(b) of the Administrative Procedure Act is addressed does not include section 210a and section 311 temporary licenses under the Interstate Commerce Act. As thus construed, both section 9(b) of the Administrative Procedure Act and the decision in *Stone's Express* v. *United States*, 122 F.Supp. 955 (D., Mass., 1954) would produce no such result as Pan-Atlantic envisages. Moreover, the Interstate Commerce Commission from whom, as appellant, such an argument could more appropriately be heard, makes no such contention in the course of its discussion of the *Stone's Express* case. (I.C.C. brief, pp. 24-26) There is good reason for this restraint on the Commission's part. It recognizes that section 9(b) preserves existing licenses from expiration only in cases in which "timely" applications for renewals have been filed. The Commission is aware that what constitutes a "timely" application can be governed by agency rules and, in point of fact, is governed by Section 2.2(i) of the Commission's rules on the matter (Pan-Atlantic brief, Appendix C, p. 14a). There is nothing to prevent the agency from requiring that a renewal application be filed *one* day following the date on which the applicant acquires the status of licensee. The present allowance by Section 2.2(a) of the Commission's rules of 60 days following issuance of the temporary license does not comport with the urgency which Pan-Atlantic's argument says exists.

If it should be necessary to conclude (and we do not believe it is) that section 9(b) of the Administrative Procedure Act preserves temporary I.C.C. licenses from expiration

when they are *succeeded* by applications for permanent authority, all that can be said of the matter is that the Congress, while it evidently meant and desired to limit section 9(b)'s third sentence solely to license renewal situations, failed partially in that temporary certificates under sections 210a(a) and 311(a) of the Interstate Commerce Act can be extended under some circumstances, although it remains true that temporary approvals under sections 210a(b) and 311(b) cannot. In the event of such a construction it would be necessary simply for Congress to consider more precise language in an amendment to section 9(b) in order to achieve the goal it had in mind. Be that as it may, certainly a conclusion that the Congress had partially failed in fairly stating its intent in the legislation would not warrant a ruling that no element of that intent should be given effect.

Construed in conformity with the analysis set forth in this brief, however, section 9(b) gives no reason to differentiate between temporary licenses issued before and those issued after the filing of applications for permanent licenses because the third sentence is not applicable to temporary licenses of any nature except in circumstances where their periodic renewal is permissible.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be affirmed.

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APPENDIX A

Docket Number	Date of Original 180 Day Order	Effective Date of Final Order	Duration of Temporary Authority Years	Months	Days
F-5205	6-5-52	12-26-52		6	23
F-5882	1-25-55	9-2-55		7	8
F-6108	11-7-55	7-16-56		8	9
F-5997	6-22-55	4-2-56		9	11
F-5201	5-5-52	3-11-53		9	25
F-5635	1-12-54	11-16-54		10	4
F-6116	11-3-55	9-10-56		10	7
F-5132	2-14-52	12-22-52		10	8
F-5811	11-8-54	9-28-55		10	20
F-5813	11-8-54	9-28-55		10	20
F-5700	5-20-54	4-29-55		11	9
F-6074	11-2-55	10-19-56		11	17
		* * *			
F-5756	9-21-54	9-28-55	1		7
F-5831	12-6-54	12-30-55	1		24
F-5083	12-26-51	11-26-53	1	1	
F-5941	3-16-55	4-16-56	1	1	
F-5847	12-15-54	1-26-56	1	1	11
F-5111	1-23-52	3-11-53	1	1	16
F-5845	3-18-55	5-7-56	1	1	19
F-5029	10-4-51	12-2-52	1	1	28
F-5030	10-4-51	12-2-52	1	1	28
F-4814	9-8-51	12-5-52	1	2	27
F-5379	1-22-53	4-19-54	1	2	28
F-5587	7-13-54	10-17-55	1	3	4
F-6071*	12-2-55	3-12-57	1	3	10
F-6136*	11-28-55	3-12-57	1	3	12
F-5908	2-15-55	6-1-56	1	3	17
F-6106*	11-22-55	3-12-57	1	3	18
F-5609	12-18-53	4-22-55	1	4	4
F-5905	2-16-55	6-25-56	1	4	9
F-6157	1-5-56	5-14-57	1	4	9
F-5921	3-16-55	8-1-56	1	4	16
F-5899	2-4-55	6-22-56	1	4	18
F-6000	7-1-55	12-5-56	1	5	4
F-5452	4-17-53	9-22-54	1	5	5

Docket Number	Date of Original 180 Day Order	Effective Date of Final Order	Duration of Temporary Authority Years	Months	Days
F-5556	1-21-54	6-27-55	1	5	6
F-5522	8-17-53	1-26-55	1	5	9
F-5143	2-20-52	8-7-53	1	5	18
F-5341	11-4-52	4-26-54	1	5	22
F-5809	10-26 54	4-18-56	1	5	23
F-6037	8-16-55	2-10-57	1	5	25
F-5735	7-9-54	1-4-56	1	5	27
		* * *			
F-6052	9-1-55	3-14-57	1	6	13
F-5622	12-29-53	7-13-55	1	6	14
F-5223	5-29-52	12-14-53	1	6	15
F-5703	7-6-54	2-21-56	1	7	15
F-5678	4-15-54	12-5-55	1	7	20
F-5674	4-15-54	12-5-55	1	7	20
F-5734	7-9-54	3-5-56	1	7	25
F-6005*	7-12-55	3-12-57	1	8	
F-4916	6-29-51	3-2-53	1	8	1
F-3300	9-26-51	6-1-53	1	8	6
F-5996*	7-6-55	3-12-57	1	8	6
F-5959	5-17-55	1-29-57	1	8	12
F-5830	11-30-54	8-15-56	1	8	16
F-5751	8-20-54	5-7-56	1	8	17
F-5774	9-23-54	6-26-56	1	9	3
F-5947	4-1-55	1-8-57	1	9	7
F-5799	10-15-54	8-6-56	1	9	22
F-5704	5-11-54	3-5-56	1	9	23
F-5438	6-5-53	4-4-55	1	9	30
F-5566	12-7-53	10-17-55	1	10	10
F-4927	7-5-51	5-21-53	1	10	16
F-5075	11-5-52	11-4-54	1	11	29
		* * *			
F-5117	1-30-52	2-1-54	2		2
F-5926*	3-4-55	3-12-57	2		8
F-5551	9-25-53	10-7-55	2		12
F-5904*	2-18-55	3-12-57	2		28
F-5718	6-9-54	7-19-56	2	1	10

Docket Number	Date of Original 180 Day Order	Effective Date of Final Order	Duration of Temporary Authority Years	Months	Days
F-5721	6-9-54	7-19-56	2	1	10
F-5541	10-5-53	12-15-55	2	2	10
F-5050	11-26-51	1-15-54	2	2	20
F-5211	6-26-52	10-1-54	2	3	5
F-5212	6-26-52	10-1-54	2	3	5
F-5210	6-26-52	10-1-54	2	3	5
F-5209	6-26-52	10-1-54	2	3	5
F-5406	2-17-53	6-1-55	2	3	15
F-5408	2-17-53	6-1-55	2	3	15
F-5563	12-18-53	4-16-56	2	3	29
F-5717	6-9-54	10-16-56	2	4	7
F-5036	10-31-51	4-19-54	2	5	19
F-4970	9-10-51	3-8-54	2	5	26
F-4969	9-10-51	3-8-54	2	5	26
		* * *			
F-5430	5-4-53	11-7-55	2	6	3
F-5666	4-7-54	12-27-56	2	8	20
F-5695*	4-23-54	3-12-57	2	10	17
		* * *			
F-5468	5-21-53	5-21-56	3		
F-4976	9-6-51	10-18-54	3	1	12
		* * *			
F-5080	12-18-51	11-14-55	3	10	27
F-5231	6-19-52	6-18-56	3	11	30
		* * *			
F-5407*	2-17-53	3-12-57	4		23
F-4819	5-9-51	7-20-55	4	2	11

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No. 424

In the Supreme Court of the United States

OCTOBER TERM, 1956

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

ATLANTIC COAST LINE RAILROAD COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, NEW YORK, NEW HAVEN AND HARTFORD RAILWAY COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

[redacted]
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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. ——

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

ATLANTIC COAST LINE RAILROAD COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, NEW YORK, NEW HAVEN AND HARTFORD RAILWAY COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

The Interstate Commerce Commission, appellant, submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the three-judge United States District Court for the District of Massachusetts in the case under appeal has not been reported, but a copy is

attached hereto as Appendix A. The opinion of the United States District Court for the District of Massachusetts in *Stone's Express, Inc.* v. *United States,* 122 F. Supp. 955, held by the District Court to be controlling in this case, is annexed hereto as Appendix B. No opinion, other than the findings in its order, was entered in this matter by the Commission. A copy of its order of October 28, 1955, which is in issue, is attached hereto as Appendix C.

JURISDICTION

This suit was brought under 28 U. S. C. 1336 by the appellees to set aside an order of the Commission entered under Section 311 (a) of the Interstate Commerce Act (49 U. S. C. 911 (a)) and Section 9 (b) of the Administrative Procedure Act (5 U. S. C. 1008 (b)). The judgment of the District Court from which this appeal is taken was entered on May 25, 1956. A copy is attached hereto as Appendix D. The District Court, by its order of May 29, 1956, stayed its judgment pending this appeal. Notice of Appeal was filed in the District Court on July 17, 1956.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b), and is sustained by the following cases: *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515; *Interstate Commerce Commission* v. *Parker,* 326 U. S. 60; *American Trucking Association* v. *United States,* 344 U. S. 298; and *United States* v. *Capital Transit Co.,* 338 U. S. 286.

STATUTES INVOLVED

The statutory provisions involved in this proceeding are:

Section 311 (a) of the Interstate Commerce Act (49 U. S. C. 911 (a)), which reads as follows:

> Sec. 311. (a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier by water or a contract carrier by water, as the case may be. Such temporary authority shall be valid for such time as the Commission shall specify but not for more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

Section 9 (b) of the Administrative Procedure Act (5 U. S. C. 1008 (b)), which reads as follows:

> Sec. 9. In the exercise of any power or authority—
>
> (a) * * *
>
> (b) Licenses. * * * In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

Included for collateral reference, as Appendix E, are Sections 210a (a) and (b) and 311 (b) of the

Interstate Commerce Act (49 U. S. C. 310a (a) and (b) and 911 (b)).

The regulations prescribed by the Commission for the administering of the above-quoted provisions of Section 9 (b) of the Administrative Procedure Act are published in Title 49 of the Code of Federal Regulations, Part 2, Sections 2.1–2.4. The pertinent provisions thereof are set forth herein as Appendix F.

QUESTION PRESENTED

Whether Section 9 (b) of the Administrative Procedure Act (5 U. S. C. 1008 (b)) extended or authorized or required the Commission to extend beyond 180 days, a temporary authority issued to Pan-Atlantic Steamship Corporation under Section 311 (a) of the Interstate Commerce Act (49 U. S. C. 911 (a)) authorizing operation as a common carrier by water, where the common carrier operation was of a continuing nature and Pan-Atlantic had filed a timely and sufficient application for a certificate of public convenience and necessity to continue the same operations conducted under the temporary authority, which application had not been finally determined by the Commission upon the expiration of the 180 days of operation allowed by the temporary authority.

STATEMENT OF THE CASE

The Commission, by order dated May 18, 1955, issued to Pan-Atlantic Steamship Corporation, under authority of section 311 (a) of the Interstate Commerce Act (49 U. S. C. 911 (a)), a temporary authority authorizing it to engage in operations in interstate

and foreign commerce, as a common carrier, between various ports of the United States, for a period of 180 days, to expire on November 14, 1955. Pan-Atlantic, on or about May 5, 1955, had filed with the Commission under section 309 (c) of the Interstate Commerce Act (49 U. S. C. 909 (c)) an application for a permanent certificate of public convenience and necessity to engage in common carrier operations which included those authorized by the temporary authority. It became apparent that the Commission would not be able to conclude the proceedings on the application for a certificate of public convenience and necessity before the expiration of the temporary authority. Accordingly, the Commission, by order of October 28, 1955, authorized Pan-Atlantic to continue to perform the water carrier service authorized by the temporary authority until the further order of the Commission, but not beyond the time the application for a permanent certificate of public convenience and necessity had been finally determined.

The Commission, in authorizing Pan-Atlantic to continue beyond 180 days, the same operations authorized by the temporary authority, determined that the operation was of a continuing nature and that Pan-Atlantic had filed a sufficient and timely application within the meaning of section 9 (b) of the Administrative Procedure Act. Accordingly, the Commission concluded that it was required by the last sentence of section 9 (b) to permit the continuance of the operations authorized by the temporary authority until the pending application for permanent authority had been finally determined.

Appellees instituted this action in the United States District Court to vacate, annul, and set aside the Commission's order of October 28, 1955, which authorized the continuance of operation by Pan-Atlantic pending the conclusion of the proceedings on the application for a certificate of public convenience and necessity.

The District Court held that the case was ruled, in principle, by the prior decision of that court in *Stone's Express, Inc.* v. *United States,* 122 F. Supp. 955 (1954), and that "with the usual deference to precedent common in this court" it should adhere to the conclusion reached in that case. In a concurring statement, two of the three judges constituting the District Court stated that were they not, as they conceived it, bound by the prior ruling in the *Stone's Express case, supra,* they would conclude that "by virtue of § 9 (b) of the Administrative Procedure Act, 60 Stat. 242, the I. C. C. did not act *ultra vires* in entering its order of October 28, 1955." It will be noted that one of the judges joining in this concurring statement had participated in and approved the conclusion in the *Stone's Express case, supra,* and that this statement indicates a reversal of opinion from that expressed in the *Stone's* case.

In *Stone's Express, Inc.* v. *United States, supra,* the District Court held that section 9 (b) of the Administrative Procedure Act did not authorize the Commission to extend a similar, but not identical, temporary authority (issued under Section 210a (b) of the Interstate Commerce Act (49 U. S. C. 310a (b)) beyond the 180-day limit upon such grants stated in Section 210a (b). An appeal from this decision was taken

to this Court, which noted probable jurisdiction. *Interstate Commerce Commission* v. *Stone's Express, Inc.*, 348 U. S. 886. That appeal became moot before it was decided by this Honorable Court, by the final determination of the permanent authority application by the Commission. Upon stipulation of the parties, the case was remanded to the District Court for dismissal as moot. 350 U. S. 906.

THE QUESTION IS SUBSTANTIAL

The question involved in this appeal is of great importance to the public in need of transportation services, to the many carriers whose operations may be affected, and to the Commission in the administration of the Interstate Commerce Act. National Transportation Policy, 49 U. S. C., preceding Section 1.

In issuing water carrier temporary authorities under Section 311 (a), (as well as motor carrier temporary authorities under the corresponding provisions of Section 210a (a)) the Commission must find that there is an immediate and urgent need for service which cannot be rendered by the existing authorized carriers. Frequently the need for service extends beyond the 180-day period for which temporary authority may be granted under these provisions. In that event, the carrier usually will file an application for a permanent certificate or permit, either before or after the granting of the temporary authority. Frequently the Commission is unable to conclude the proceeding on the permanent authority application before the expiration of the 180-day period, in which case the Commission,

according to its interpretation, may authorize the applicant to continue the operation until the determination of the permanent authority application. If the Commission is without power thus to extend temporary operating authorities pursuant to Section 9 (b) of the Administraive Procedure Act, carriers will be forced to discontinue such temporary operation at the end of the 180-day period, regardless of the public need or the financial consequences to the carrier. The broad practical importance of the question is indicated by the fact that during the past five years such extensions of water carrier temporary authorities in excess of 180 days has averaged more than five per year, and during the same period similar extension of motor carrier authorities averaged 394 per year. On August 31, 1956, there were outstanding a total of 385 water carrier and motor carrier temporary authorities issued under Section 210a (a) or 311 (a), which had been extended beyond 180 days under Section 9 (b) of the Administrative Procedure Act, pending the determination of permanent authority applications. In addition, there were in effect 60 extensions of temporary acquisition authority under the related provisions of Section 210a (b).

The Commission, soon after the enactment of the Administrative Procedure Act, adopted the interpretation of Section 9 (b) with respect to temporary authorities issued under Sections 210a (a) and 311 (a) which is challenged in the present case and it has since consistently followed that interpretation. The first orders extending temporary authorities in accordance with this interpretation were issued by

Division 5 of the Commission during the month of September, 1947. This practice has been reported to Congress in the Annual Reports of the Commission, for example, the Annual Report for the year 1948, page 103, contains the following entry: "Extension of temporary authorities under Section 9 (b), (5 U. S. C. 1008 (b))," listing the total number of such extensions for that year as 782. On June 6, 1948, the Commission adopted and published in the Federal Register (13 F. R. 4150) rules governing the procedure for extending under Section 9 (b), temporary authorities authorizing the continuance of operations established under Sections 210a (a) and 311 (a) (Appendix F).[1]

The only court decisions on the question at issue in this case, whether Section 9 (b) of the Administrative Procedure Act authorizes or requires extension beyond 180 days of operations conducted under Sections 210a (a) and (b) and 311 (a) and (b) of the Interstate Commerce Act, are the *Stone's Express, Inc., supra,* and the case now before the Court. As previously pointed out herein in the "Statement of the Case," p. 6, the District Court in *Stone's Express, Inc.,* held that the Commission was not empowered by Section 9 (b) of the Administrative Procedure Act to

[1] The Civil Aeronautics Board, under Section 416 of the Civil Aeronautics Act issues temporary exemptions for the operation of aircraft. The Board has interpreted Section 9 (b) of the Administrative Procedure Act as applicable to such temporary exemptions, in a manner similar to the interpretation placed on Section 9 (b) by this Commission. This is shown by the Board's regulations governing the extension of exemptions under that provision, published as Part 200, Title 14, of the Code of Federal Regulations.

authorize the continuance of an operation conducted under temporary authority issued under Section 210a (b) beyond the 180-day limitation in that subsection. In the present case a majority of the Court stated that except for the fact that they considered themselves to be bound by the prior decision in the *Stone* case, they would hold that the Commission is empowered to make such extensions under Section 9 (b). There is, therefore, a conflict in the views of the judges comprising the District Court in these two cases. Moreover, this Court noted jurisdiction in the *Stone's Express* case. These circumstances indicate that the question is one of substantial difficulty which should be resolved by this Court.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted.

ROBERT W. GINNANE,
General Counsel.
JAMES A. MURRAY,
Associate General Counsel,
Interstate Commerce Commission.

SEPTEMBER 1956.

APPENDIX A

Civil Action No. 56–232–W

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ATLANTIC COAST LINE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, AND SOUTHERN RAILWAY COMPANY, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT, AND INTERSTATE COMMERCE COMMISSION, AND PAN-ATLANTIC STEAMSHIP CORPORATION, INTERVENING DEFENDANTS

Before MAGRUDER, *Circuit Judge*, and FORD and WYZANSKI, *District Judges*.

W. Q. KEENAN,
EDMUND M. SWEENEY,
For Plaintiffs.

STANLEY N. BARNES,
Assistant Attorney General,
ANTHONY JULIAN,
United States Attorney,
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ALBERT PARKER,
For the United States of America.

ROBERT W. GINNANE,
General Counsel,
JAMES A. MURRAY,
Associate General Counsel,
For the Interstate Commerce Commission.

JAMES JULIAN WEINSTEIN,
WARREN PRICE,
DAVID G. MACDONALD,
MACLEAY, LYNCH & MACDONALD,
WILLIAM H. ARMBRECHT,
For Pan-Atlantic Steamship Corp.

OPINION of the COURT

May 17, 1956

Per Curiam. The amended complaint herein seeks a decree from us setting aside an order of the Interstate Commerce Commission.

On or about May 5, 1955, Pan-Atlantic Steamship Corporation made application to the Commission for permanent authority to operate as a common carrier by water between certain Atlantic and Pacific ports.

While this application was pending, upon application by Pan-Atlantic Steamship Corp. for temporary authority under § 311 (a) of the Interstate Commerce Act, as amended (49 U. S. C. § 911 (a)), the Commission issued its order on May 18, 1955, granting authority to Pan-Atlantic Steamship Corp. to operate as a common carrier by water between certain named Atlantic and Pacific ports up to and including November 14, 1955.

Subsequently, by order entered October 28, 1955, the Commission authorized Pan-Atlantic Steamship Corp. to continue to perform such temporary water carrier service, until further order of the Commission, but not beyond the time the pending application for permanent authority should have been determined. This order of October 28, 1955, is the one complainants seek to have us annul, on the ground that it constitutes an *ex parte* extension of temporary authority beyond the maximum period of 180 days pre-

scribed in § 311 (a). The Commission, on the other hand, claims that its more extended order is sanctioned by § 9 (b) of the Administrative Procedure Act (60 Stat. 242).

This case is ruled in principle by the decision of this court in *Stone's Express, Inc.* v. *United States,* 122 F. Supp. 955 (1954). (Our judgment was subsequently vacated for mootness pursuant to stipulation of the parties, *Interstate Commerce Commission* v. *Stone's Express, Inc.,* 350 U. S. 906 (1955).) Though that case involved the 180-day limitation in § 210a (b) of the Interstate Commerce Act (49 U. S. C. § 310a (b)), the issue as to the Commission's power is essentially the same. We think, consistent with the usual deference to precedent common in this Court, we should adhere to the conclusion reached in *Stone's Express, Inc.* v. *United States,* supra.

The plaintiffs' motion for summary judgment is granted, and a permanent injunction will be entered requiring the Commission to set aside and annul its order of October 28, 1955, in so far as that order continues the temporary operation previously authorized by the Commission.

WYZANSKI, *District Judge.* I concur exclusively on the ground that I always defer to an earlier decision by my brethren, except where the decision is remote in time, or except where the court seems to me to have been inescapably wrong. Neither of these conditions is present here. However, in order to make clear the desirability of a Supreme Court review of the problem, I add that were the matter *res integra,* and were I not, as I conceive, bound by the ruling in *Stone's Express, Inc.* v. *United States,* D. Mass., 122 F. Supp. 995 (1954), I should conclude that, by virtue of § 9 (b) of the Administrative Procedure Act, 60 Stat. 242, the I. C. C. did not act *ultra vires* in entering its order of October 28, 1955. I am authorized to state that Judge FORD agrees with this view.

APPENDIX B

[Printed at 122 F. Supp. 955]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 54-187-M

STONE'S EXPRESS, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL, DEFENDANTS

Before HARTIGAN, *Circuit Judge,* and FORD and MCCARTHY, *District Judges.*

OPINION OF THE COURT

May 25, 1954

HARTIGAN, *Circuit Judge.* This is an action brought against the United States of America and the Interstate Commerce Commission under the provisions of 28 U. S. C. §§ 1336, 2321 through 2325 inclusive, in which the plaintiff seeks to enjoin and vacate an order of the Commission dated January 19, 1954, granting to St. Johnsbury Trucking Company, Inc., temporary approval to lease all the operating rights of Hinsch Transportation Co., Inc., St. Johnsbury and Hinsch intervened as parties defendants under the provisions of 28 U. S. C. § 2323.

On April 12, 1954, the plaintiff, pursuant to Rule 12 (c) of the Federal Rules of Civil Procedure, made a motion for an order granting its judgment on the

pleadings. The material allegations of the complaint admitted by the defendants and the intervenors and the orders of the Commission annexed to the pleadings establish the following facts.

The plaintiff, a Massachusetts corporation, is engaged in interstate commerce as a motor common carrier under a Certificate of Public Convenience and Necessity issued by the Commission. On November 27, 1951, St. Johnsbury, a Vermont corporation, and Hinsch, a New York corporation, both common carriers operating under Certificates of Public Convenience and Necessity issued by the Commission, filed a joint application under Section 5 of the Interstate Commerce Act, 49 U. S. C. § 5, for approval of a proposed purchase by St. Johnsbury of Hinsch's certificate. Simultaneously with the filing of said application, St. Johnsbury and Hinsch sought temporary authority under Section 210a (b) of the Interstate Commerce Act, 49 U. S. C. § 310a (b), to conduct operations for which permanent authority was sought in the Section 5 application. On December 18, 1951, Division 4 of the Commission entered an order which granted the application under Section 210a (b) and authorized St. Johnsbury to lease all the operating rights of Hinsch for a period not exceeding 180 days. On June 3, 1952, Division 4 entered an order extending the temporary authority previously granted by the December 18, 1951, order until "* * * the application filed herein for authority under Section 5 of the Interstate Commerce Act is 'finally determined' as that term is defined * * *" in 49 Code Fed. Regs. § 2.1 to 2.3. By an order dated July 2, 1953, Division 4 denied the Section 5 application of St. Johnsbury and Hinsch, but subsequent orders postponed the termination of St. Johnsbury's temporary authority granted by the Decem-

ber 18, 1951, and June 3, 1952, orders until December 15, 1953. On January 19, 1954, the Commission vacated and set aside the July 2, 1953, order of Division 4, and entered an order which approved the Section 5 application and extended the temporary authority previously granted to St. Johnsbury. The plaintiff's petition for reconsideration of this order with respect to the extension of the temporary authority was denied by the Commission on February 23, 1954. By subsequent orders dated April 5, 1954, and April 30, 1954, St. Johnsbury was authorized to purchase the operating rights of Hinsch between July 5, 1954, and August 4, 1954, and effective with the consummation of the authorized transaction or 30 days from July 5, 1954, whichever first occurs, the temporary authority granted by the order entered on December 18, 1951, as amended by the order entered on June 3, 1952, was to be of no further force and effect.

The sole issue presented by the plaintiff's motion for judgment on the pleadings is whether or not the Commission properly granted St. Johnsbury temporary approval to lease all of Hinsch's operating rights for a period exceeding 180 days. The plaintiff argues that under the provisions of Section 210a (b) of the Interstate Commerce Act, 49 U. S. C. § 310a (b),[1] the

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[1] "§ 310a. *Temporary authority*

* * * * * *

"(b) Pending the determination of an application filed with the Commission for approval of a consolidation or merger of the properties of two or more motor carriers, or of a purchase, lease, or contract to operate the properties of one or more motor carriers, the Commission may, in its discretion, and without hearings or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days, of the operation of the motor carrier properties sought to be acquired by the person proposing in such pending application to acquire such properties, if

§ 2.4 *Termination of Temporary Authority or Approval.* Nothing in these rules shall be construed as preventing the Commission from terminating at any time, in accordance with law, any temporary authority or approval, or any extension thereof under Section 9 (b) of the Administrative Procedure Act (5 U. S. C. 1008 (b)).

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Commission is prohibited from granting a temporary approval beyond a period of 180 days. The defendants on the other hand, contend that by the third sentence of Section 9 (b) of the Administrative Procedure Act, 5 U. S. C. § 1008 (b),[2] St. Johnsbury had the right to operate Hinsch's property under its temporary approval until such time as the Commission finally determined the Section 5 application for permanent authority.

The clear and unambiguous language of Section 210a (b) of the Interstate Commerce Act and of Sec-

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it shall appear that failure to grant such temporary approval may result in destruction of or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their future usefulness in the performance of adequate and continuous service to the public."

[2] "§ 1008. *Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses.*

"In the exercise of any power or authority—

* * * * * *

"(b) In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 1006 and 1007 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency. June 11, 1946, c. 324, § 9, 60 Stat. 242."

tion 9 (b) of the Administrative Procedure Act, and their legislative history, compel us to hold that the third sentence of Section 9 (b) does not apply to a temporary approval granted by the Commission under Section 210a (b).

The defendants rely solely on the temporary approval granted to St. Johnsbury by the Commission to sustain their contention that St. Johnsbury was a "licensee" within the meaning of the third sentence of Section 9 (b) of the Administrative Procedure Act. Under the provisions of Section 210a (b), St. Johnsbury obtained the temporary approval to lease all the operating rights of Hinsch only by virtue of having previously filed a Section 5 application for permanent authority. The third sentence of Section 9 (b), however, in using the words "In any case in which the *licensee* has * * * made timely and sufficient application for a renewal or a new license, * * *" indicates that the statute presupposes at the time of the filing of the application the existence of a license. [Italics ours.] The language of the statute thus clearly reveals that it was designed to prevent a license in existence at the time of the filing of the application for a renewal or a new license from terminating until the agency has finally determined whether or not to grant the renewal or the new license. But, at the time St. Johnsbury filed its Section 5 application, it did not have a license permitting it to lease Hinsch's operating rights. It obtained its temporary approval to lease all of Hinsch's operating rights only *after* the Section 5 application had been filed. St. Johnsbury is not, therefore, a "licensee" within the meaning of the third sentence of Section 9 (b) and does not have the right by virtue of that statute to lease Hinsch's

operating rights until the Commission finally determines the Section 5 application.

In addition, the legislative history of the third sentence of Section 9 (b) indicates that the statute was only intended to apply to licenses existing at the time of the filing of the application for a renewal or a new license.

The Senate Judiciary Committee Print, June 1945 of the Administrative Procedure Act, gives the following explanation of Section 9 (b):

> "This subsection is designed to ameliorate the difficulties where private parties are required to secure licenses. * * * The third sentence automatically extends a license in any case in which the licensee has made timely application for renewal but the granting agency fails to act prior to the expiration of the existing license. A similar provision is contained in the licensing procedure act of the State of Ohio (Act of June 3, 1943, sec. 1 amending secs. 154–167 (sic) of the General Code; Amended substitute Senate bill No. 36)." Page 35 of Senate Doc. No. 248, 79th Cong. 2d Sess., entitled "Administrative Procedure Act, Legislative History, 79th Congress."

Said Ohio Act referred to in the Senate Judiciary Committee Print and found in Vol. 120, p. 361, Laws of Ohio, (1943, 1944), states in part:

> "No licensee shall be required to discontinue the operation of a business or profession because of the failure of an agency to accept or reject said licensee's application for a new license of the same type or class, or renewal of an existing license, or application for registration, prior to the expiration of the license *held by said licensee at the time said application was made* where said application was filed with the agency within the time and in the manner provided by statute or rule of the agency." [Italics ours.]

Also, prior to the passage of the Administrative Procedure Act, there is no doubt that under the facts of the instant case the Commission only had authority to grant a temporary approval for a period not exceeding 180 days by the provisions of Section 210a (b). The defendants, therefore, in arguing that the Commission now has authority to grant a temporary approval exceeding 180 days by virtue of the enactment of the Administrative Procedure Act, in effect contend that the third sentence of Section 9 (b) repeals Section 210a (b) by implication. The Supreme Court, however, has frequently stated that a statute will not be held to repeal a prior statute by implication unless no other reasonable construction is possible. *Posadas* v. *National City Bank*, 296 U. S. 497 (1936); *United States* v. *Jackson*, 302 U. S. 628 (1938); *United States* v. *Borden Co.*, 308 U. S. 188 (1939). The intention of the legislature to repeal "* * * must be clear and manifest." *Red Rock* v. *Henry*, 106 U. S. 596, 602 (1882). There must be a "positive repugnancy between the provisions of the new laws and those of the old." *Wood* v. *The United States*, 16 Pet. 342, 363 (1842). We find no such repugnancy between the provisions of §§ 210a (b) and 9 (b). Section 210a (b) in clear and unambiguous terms states that the Commission may grant temporary approval for a period not *exceeding 180 days*. In holding that the third sentence of § 9 (b) does not apply to the temporary approval granted to St. Johnsbury, we are, therefore, following the well established rule of giving effect to both statutes covering the same general subject matter. *United States* v. *Borden Co.*, supra.

A final contention of the defendants is that the Commission pursuant to Section 12 of the Administra-

tive Procedure Act, 5 U. S. C. § 1011,[3] published its interpretation of the third sentence of Section 9 (b) in which it construed that sentence as being applicable to temporary approvals granted under Section 210a (b).[4] The contemporaneous and continued construction of the Commission is entitled to great weight. *United States* v. *Alabama Railroad Co.*, 142 U. S. 615 (1892) *U. S.* v. *Amer. Trucking Ass'ns.*, 310 U. S. 534 (1940). But, because the provisions of §§ 210a (b) and 9 (b) are unambiguous and their directions specific, "* * * there is no power to amend it by regulation." *Koshland* v. *Helvering*, 298 U. S. 441, 447 (1936); See *Alaska Steamship Co.* v. *U. S.*, 290 U. S. 256 (1933); *Social Security Board* v. *Nierotko*, 327 U. S. 358 (1946). "* * * Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority * * *" with respect to the granting of temporary approvals under section 210a (b). *United States* v. *Mo. Pac. R. Co.*, 278 U. S. 269, 277, 278 (1929).

The plaintiff's motion for judgment on the pleadings is granted and a permanent injunction will be entered requiring the Commission to set aside and annul its order of January 19, 1954, insofar as that order continues the temporary operations authorized by the Commission.

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[3] "§ 1011. *Impairment of rights; effect on other laws, separability; subsequent legislation; effective date*

"* * * Every agency is granted all authority necessary to comply with the requirements of this chapter through the issuance of rules or otherwise. * * *"

[4] 49 Code Fed. Regs. § 2.1 to 2.3.

APPENDIX C

ORDER

AT A SESSION OF THE INTERSTATE COMMERCE COMMISSION, DIVISION 4, HELD AT ITS OFFICE IN WASHINGTON, D. C., ON THE 28TH DAY OF OCTOBER, A. D. 1955

No. W–376 (Sub-No. 11)

PAN-ATLANTIC STEAMSHIP CORPORATION TEMPORARY AUTHORITY—INTERCOASTAL TRADE

No. W–376 (Sub-No. 12)

PAN-ATLANTIC STEAMSHIP CORPORATION TEMPORARY AUTHORITY—INTERCOASTAL TRADE (2)

It appearing, That by order of May 18, 1955, the Commission, division 4, granted Pan-Atlantic Steamship Corporation temporary authority to operate as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation (1) of passengers and commodities generally (a) from Philadelphia, Pa., Baltimore, Md., Charleston, S. C., Jacksonville and Miami, Fla., to Seattle, Wash., Portland, Oreg., San Francisco, Oakland, Alameda and Los Angeles Harbor, Calif., (b) from San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor to Boston, Mass., New York Harbor, N. Y., Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (c) from Seattle and Portland to Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (2) of passengers between New Orleans, La., and Houston, Tex., on the one hand, and, on the other, Seattle, Portland, San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor.

It further appearing, That there is a public need for continuance of the said water carrier service, that it is an activity of a continuing nature, and that this service corresponds in part with that which the carrier by application No. W–376 (Sub-No. 13) seeks a certificate of public convenience and necessity; and good cause appearing therefor:

It is ordered, That said carrier be, and it is hereby, authorized to continue to perform said water carrier service until further order of the Commission, but not beyond the time said application No. W–376 (Sub-No. 13) has been finally determined.

By the Commission, division 4.

[SEAL] HAROLD D. MCCOY,
Secretary.

APPENDIX D

UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

Civil Action No. 56–232–W

ATLANTIC COAST LINE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, SOUTHERN RAILWAY SYSTEM AND THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT, AND THE INTERSTATE COMMERCE COMMISSION AND PAN-ATLANTIC STEAMSHIP CORPORATION, INTERVENING DEFENDANTS

Judgment

This cause came on to be heard on the plaintiffs' motion for leave to amend their complaint and on the motions of the plaintiffs and of Pan-Atlantic Steamship Corporation, intervening defendant, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the verified first amended complaint and the answers thereto filed by Pan-Atlantic Steamship Corporation and the Interstate Commerce Commission, intervening defendants, and the answer of the United States filed responsively to the complaint, having found that there is no genuine issue as to any material fact and no controversial question of fact to be submitted to the Trial

Court; and having concluded that plaintiffs are entitled to judgment as a matter of law,

It is hereby ordered, adjudged, and decreed:

(1) That the plaintiffs' motion for leave to file their first amended complaint is granted;

(2) That the plaintiffs' motion for summary judgment is granted and Pan-Atlantic Steamship Corporation's motion for summary judgment is denied.

(3) That the order of the Interstate Commerce Commission dated October 28, 1955, entered in I. C. C. Docket No. W-376 (Sub-Nos. 11 and 12) extending Pan-Atlantic Steamship Corporation's authority to engage in intercoastal operations beyond a period of 180 days shall be, and it is hereby vacated, annulled and set aside.

Issued at Boston, Massachusetts, this 25th day of May 1956.

CALVERT T. MAGRUDER,
Judge of the United States Court of Appeals.

FRANCIS J. W. FORD,
United States District Court Judge.

CHARLES E. WYZANSKI, JR.,
United States District Court Judge.

APPENDIX E

Sections 210a (a) and (b) and 311 (b) of the Interstate Commerce Act (49 U. S. C. 310a (a) and (b) and 911 (b)):

Sec. 210a. (a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

(b) Pending the determination of a application filed with the Commission for approval of a consolidation or merger of the properties of two or more motor carriers, or of a purchase, lease, or contract to operate the properties of one or more motor carriers, the Commission may, in its discretion, and without hearings or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days, of the operation of the motor carrier properties sought to be acquired by the person proposing in such pending application to acquire such properties, if it shall appear that failure to grant such temporary approval may result in destruction of or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their future

usefulness in the performance of adequate and continuous service to the public.

Sec. 311. (b) Pending the determination of an application filed with the Commission under this Act for approval of a consolidation or merger of the properties of two or more water carriers, or of a purchase, lease, or contract to operate the properties of one or more water carriers, the Commission may, for good cause shown, and without hearings or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days of operation of the properties of such carriers by water by the person proposing to acquire them, as aforesaid.

APPENDIX F

[Title 49, Code of Federal Regulations, § 2.1–2.4]

PART 2—SPECIAL RULES OF PROCEDURE [REVISED]

TEMPORARY OPERATING AUTHORITIES AND APPROVALS

Sec.

2.1 Extension of temporary operating authorities or approval.
2.2 Definitions and interpretations.
2.3 Additional grant for new need.
2.4 Termination of temporary authority or approval.

* * * * * *

SOURCE: §§ 2.1 to 2.4 appear at 19 F. R. 6228, Sept. 18, 1954.

§ 2.1 *Extension of Temporary Operating Authority or Approval.* The Commission will determine upon written request by any interesed party, or it may determine upon its own initiative, whether under Section 9 (b) of the Administrative Procedure Act (5 U. S. C. 1008 (b)):

(a) any temporary operating authority granted under 210a (a) or 311 (a) of the Interstate Commerce Act (49 U. S. C. 310a (a), 911 (a)) is continued in force, beyond the expiration date specified in such temporary operating authority, until the determination of an application filed by the holder of such temporary operating authority for a certificate of public convenience and necessity or a permit to engage in operations authorized by such temporary operating authority.

(b) any temporary approval granted under Section 210a (b) or 311 (b) of the Interstate Commerce Act (49 U. S. C. 310a (b), 911 (b)), is continued in force, beyond the expiration date specified in such temporary approval, until the determination of the related application for approval of a consolidation or merger of the properties of two or more motor or water

carriers or of a purchase, lease, or contract to operate the properties of one or more such carriers.

In order to afford sufficient time for consideration and action thereon, a written request for such a determination should be filed not later than 30 days prior to expiration of the temporary operating authority or approval.

§ 2.2 *Definitions and Interpretations.* In making the determination provided in Section 2.1, the Commission will be guided by the folowing interpretations of the provisions of the 3rd sentence of section 9 (b) of the Administrative Procedure Act (5 U. S. C. 1008 (b)), and of the provisions of Section 210a (a) of the Interstate Commerce Act (49 U. S. C. 310a (a)):

(a) "Timely Application."—An application for a certificate of public convenience and necessity or a permit filed in accordance with the applicable laws, regulations, and instructions, not later than 60 days after issuance of temporary authority for a period of 180 days or not later than 60 days after issuance of the first of a series of consecutive temporary authorities aggregating 180 days.

(b) "Sufficient Application."—An application for a certificate of public convenience and necessity or a permit, which is in the form, contains the information, and is accompanied by the documents and exhibits required by the applicable laws, regulations, and instructions.

(c) "Aggregate of 180 days."—As used in Section 210a (a) of the Act and Commission notices and orders relating thereto, the term "for not more than an aggregate of one hundred and eighty days" means the total number of days of temporary authority which may be granted to a motor carrier under the provisions of that Section of the Act to meet a continuing need for a particular service.

(d) "Series of grants."—As relates to extensions of temporary authorities under Section 9 (b) of the administrative Procedure Act [5 U. S. C. 1008 (b)], only those grants of temporary authority for less than 180 days which have been approved to meet a specific continuing need and which follow one after the other without interruption for a total of 180 days will be considered as a "series of consecutive temporary authorities aggregating 180 days."

(e) "Need considered not to be of a continuing nature."—Any need which is the basis of an operation authorized by a temporary authority or approval to be conducted for a period of less than an aggregate of 180 days is presumed not to be of a "continuing nature" unless the Commission otherwise expressly determines.

(f) "Final determination of Application."—For the purpose of this Section—

(1) An application for a certificate or permit shall be considered to be "finally determined" (i) with respect to operations for which the certificate or permit is denied, upon the expiration of the period allowed by the rules and regulations of the Commission or by the order (whichever is greater) within which petitions for rehearing, reargument, or reconsideration may be filed, or upon the denial of such petitions if filed, and (ii) with respect to operations for which the certificate or permit is granted, when the certificate or permit becomes effective.

(2) An application for approval of a consolidation or merger of the properties of two or more motor or water carriers, or of a purchase of the properties of one or more such carriers shall be considered to be "finally determined", (i) in the case of denial of such an application, upon the expiration of the pe-

riod allowed by the rules and regulations of the Commission or by the order (whichever is greater) within which petitions for rehearing, reargument, or reconsideration may be filed, or upon the denial of such petitions if filed, and (ii) in the case of approval of such an application, when the certificate or permit to be transferred in connection with such application has been reissued in the name of the transferee and has become effective.

(3) An application for approval of a lease or contract to operate the properties of one or more motor or water carriers shall be considered to be "finally determined", (i) in the case of denial of such an application, upon the expiration of the period allowed by the rules and regulations of the Commission or by the order (whichever is greater) within which petitions for rehearing, reargument, or reconsideration may be filed, or upon the denial of such petitions if filed, and (ii) in the ~~case of~~ approval of such an application, when the order approving such application becomes effective.

§ 2.3 *Additional Grant for New Need.* If the need for a particular service ceases and the temporary authority covering such need expires or is revoked and a new or separate need arises subsequent to such expiration or revocation, additional temporary authority for the 180-day aggregate, or for a shorter period, may be granted to the same carrier for the service notwithstanding the prior grant or grants. However, an application filed after the expiration or revocation of temporary authority for an aggregate of 180 days will be denied unless the facts clearly show that the application is in reality based on a new need and not on a continuation of the need on which the prior grant of authority was based.